TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 491.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

ESTEVE BROTHERS AND COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 27, 1930.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1930.

(27,948)

(27,848)

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday in November, A. D. 1919, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, Circuit Judge, and the Honorable Rhydon M. Call and the Honorable J. C. Hutcheson, Jr., District Judges.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 1st day of March, A. D. 1920, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3506, as follows, to-wit:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Louisiana.

[Original Record Filed March 1, 1920.]

U. S. Circuit Court of Appeals. Filed Mar. 11, 1920. Frank H. Mortimer, Clerk.

1 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY, Plaintiff, Defendant in Error.

versus

WESTERN UNION TELEGRAPH COMPANY, Defendant, Plaintiff in Error.

Messrs. Spencer, Fenner, Gidiere & Phelps, for Western Union Telegraph Company, defendant, plaintiff in error.

Messrs. Hall, Monroe & Lemann, for Esteve Brothers & Company, plaintiff, defendant in error.

Writ of Error to the United States District Court for the Eastern District of Louisiana, New Orleans Division, from the United States Circuit Court of Appeals for the Fifth Circuit, Returnable Within Thirty (30) Days from the Nineteenth (19th) Day of February, A. D. 1920, at the City of New Orleans, State of Louisiana.

Petition.

2

Filed March 27th, 1918.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans:

Civil District Court for the Parish of Orleans.

Petition and Affidavit.

Filed February 16th, 1918.

Civil District Court for the Parish of Orleans, State of Louisiana.
Division "C."

No. 122,972. Docket 4.

ESTEVE BROTHERS & COMPANY

versus

WESTERN UNION TELEGRAPH COMPANY.

Petition.

To the Honorable the Judge of the Civil District Court in and for the Parish of Orleans, State of Louisiana:

The Petition of Esteve Brothers & Company, a commercial partnership composed of Jose M. Esteve, Angel; Ramon Esteve, Luis Esteve

(all residents of Barcelona, Spain,) and F. Janvier Esteve, a resident of Savannah, Georgia, the said partnership having offices in New Orleans, Louisiana, and Savannah, Georgia, herein appearing through all of said members, with respect represents:

I.

That on the 13th day of September, 1917, Jose M. Esteve, being the agent and representative of said firm in Barcelona, Spain,
3 deposited in the Central Office of the Telegraph Administration at Barcelona, for transmission to your petitioner at New Orleans, Louisiana, a cable reading as follows, to-wit:

"Esteve Brothers,
New Orleans:

Sell two hundred bales futures naming equivalent New Orleans, October price.
(Signed) ESTEVE."

II.

That the said cable was duly accepted for transmission to your petitioner at New Orleans, Louisiana, and was by the Central Office of the Telegraph Administration at Barcelona entrusted and delivered to and accepted by the defendant Western Union Telegraph Company (a corporation doing business in this Parish and State), which thereby undertook and agreed to deliver the same to your petitioner at New Orleans.

III.

That the said Western Union Telegraph Company, instead of delivering the said cable as received by it or as sent from Barcelona, as it had agreed and undertaken to do, utterly failed to do so, but, on the contrary, transmitted and delivered it with such gross and inexcusable carelessness and negligence as to deliver it reading as follows:

"Esteve Brothers,
New Orleans:

Sell two thousand bales futures naming equivalent New Orleans, October price.
(Signed) ESTEVE."

4 IV.

That as indicated by the foregoing, the Western Union Telegraph Company delivered the said cable so as to make it read "two thousand" bales instead of two hundred bales.

V.

That the said cable, as originally sent, was not written in any code but in plain English, and that the number of bales was not stated in figures but written out in letters, and that the cable bore on its face full notice of its importance — of the loss which would naturally be caused by an error in the figures.

VI.

That upon receipt of the cable as delivered to it by the Western Union Telegraph Company directing the sale of "two thousand" bales of futures, your petitioner caused two thousand bales of January futures to be sold, and notified Jose M. Esteve at Barcelona by cable as follows:

Sept. 15th/17.

"Jose Esteve,
Barcelona:

Sold two thousand bales January, New Orleans nineteen fifty, October price nineteen sixty-two.
(Signed) ESTEVE."

the meaning of said cable being that your petitioner had sold two thousand bales of cotton for future delivery at the price of 19.50 cents per pound, equivalent to 19.62 cents per pound for October delivery.

5 VII.

That your petitioner's cable of September 15th, 1917, sent through the defendant Western Union Telegraph Company, was evidently delayed in transmission, or the answer thereto was delayed, and on September 25th, 1917, your petitioner received the following cable from Barcelona:—

"Barcelona, 22.

Esteve Brothers,
New Orleans:

Your confirmation sale two thousand bales January nineteen fifty wrong. Order was two hundred bales instead two thousand bales reported. Confirm correction.
(Signed) ESTEVE."

VIII.

Immediately upon receipt of this cable of correction, your petitioner, in order to make the correction, repurchased eighteen hundred bales of cotton for future delivery in January, out of the two thousand which it had theretofore sold, so as to make the net sale two hundred bales, to conform to the original cable as originally sent.

IX.

That in the interval, the cotton future market had gone up, so that your petitioner's purchases were made at 23.01 cents per pound, as compared with the selling price of 19.50 cents per pound, resulting in an error of $31,590, to which must be added $135 for commissions, making a total of $31,725, which amount has been actually paid out in cash and lost by your petitioner as a result of the error above described.

6 X.

Your petitioner has been for many years in the cotton exporting business in New Orleans and Savannah, with a representative at Barcelona, and has had extensive business relations and dealings with the defendant Western Union Telegraph Company; and said Western Union Telegraph Company was well aware, through said dealings, as well as generally aware as a member of the business community, of the character and nature of petitioner's business, and the character and nature of the original cable sent to your petitioner, and of the damages which would naturally ensue from an error in the transmission and delivery thereof.

XI.

That the Western Union Telegraph Company is responsible to your petitioner for the heavy loss and damage occasioned to your petitioner by the grossly erroneous and negligent transmission and delivery of the message above described.

Wherefore, the premises considered, petitioner prays that said Western Union Telegraph Company be served with a copy hereof, through its proper agent, and be cited to appear and answer hereto, and that after due proceedings had, there be judgment in favor of your petitioner and against the said Western Union Telegraph Company, in the full sum of Thirty-One Thousand Seven Hundred and Twenty-five ($31,725) Dollars, with legal interest from this date, and all costs. And your petitioner further prays for general and equitable relief and for such further orders as the nature of the case may require or law or equity make proper.

(Signed) HALL, MONROE & LEMANN,
Attorneys for Petitioner.

7 STATE OF LOUISIANA,
Parish of Orleans:

Yvon L. Duquesnay, being duly sworn says that he is the Manager of the New Orleans Office of Esteve Brothers & Company, the petitioner above named, and duly authorized to made this affidavit,

and that all of the facts and allegations above stated are true and correct.

(Signed) PER PRO ESTEVE BROS. & CO.
YVON L. DUQUESNAY.

Sworn to and subscribed before me, at New Orleans, La., on this 15th day of February, 1918.

(Signed) WATTS K. LEVERICH,
Notary Public.

Petition, Affidavit, and Order of Removal.

Filed March 27, 1918.

Civil District Court for the Parish of Orleans, State of Louisiana. Division "C."

No. 122,972, Docket 4.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH COMPANY.

Petition, Affidavit, Order, and Bond of Removal to U. S. District Court.

Filed February 28th, 1918.

The petition of Western Union Telegraph Company, defendant in the above numbered and entitled cause, respectively shows:

8 I.

That the above suit was begun against this defendant in the Civil District Court for the Parish of Orleans and State of Louisiana, on or about the eighteenth day of February, 1918.

II.

That at the time said suit was begun and at the present time, the defendant was, and still is, a corporation chartered by and existing under and by virtue of the laws of the State of New York, and having its chief office and place of business in the City of New York, and is not a citizen nor a resident of the State of Louisiana.

III.

That the plaintiff is a commercial co-partnership, composed of Jose M. Esteve, Angel Ramon Esteve, Luis Estive and F. Javier

Esteve; that none of the aforesaid members of said firm are citizens of either the State of New York or the State of Louisiana, or residents thereof, and that all of said members of said firm are aliens, being subjects of the King of Spain.

IV.

That the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

V.

Your petitioner further avers that the time has not yet elapsed wherein your petitioner is required, under the practice and laws of the State of Louisiana, and under the rules of this Honorable Court, to answer or plead to the petition filed by the plaintiff in this cause.

VI.

That by reason of the premises this petitioner, defendant in the above entitled and numbered cause, desires and is entitled to have said suit removed from the Civil District Court for the Parish of Orleans, State of Louisiana, into the United States District Court for the Eastern District of Louisiana, New Orleans Division, which is the District Court to be held in the district where this suit is pending.

VII.

Petitioner shows that a written notice of this petition and the accompanying bond for removal was given Esteve Brothers, plaintiff herein, prior to the filing of this petition and bond.

VIII.

Your petitioner presents and files herewith a good and sufficient bond, as provided by the Statutes of the United States, in such cases, that it will within thirty days from the date of the filing of this petition, enter in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a certified copy of the record in this suit, and for the payment of all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and to direct a transcript of

the record herein to be made for the United States District
10 Court for the Eastern District of Louisiana, New Orleans Division, as provided by law.

WESTERN UNION TELEGRAPH COMPANY,
(Signed) By HOWE, FENNER, SPENCER & COCKE,
Its Attorneys.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, W. A. Porteous, who being duly sworn, deposes and says:

That he is the General Agent for the State of Louisiana, for the Western Union Telegraph Company, and is the superior officer of said company in said state, and is duly authorized to make this affidavit; that he has read the foregoing petition and that all of the allegations therein contained are true and correct.

(Signed) WM. A. PORTEOUS.

Sworn to and subscribed before me, this 27th day of February, 1918.

(Signed) PIERRE D. OLIVIER,
[SEAL.] *Notary Public.*

Civil District Court for the Parish of Orleans, State of Louisiana, Division "C."

No. 122,972, Docket —.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH COMPANY.

This cause coming on for hearing upon the application of defendant herein for an order transferring this cause to the United
11 States District Court for the Eastern District of Louisiana, New Orleans Division, and it appearing to the Court that the defendant has filed its petition for removal in due form of law, and that the defendant has filed its bond with good and sufficient surety, as provided by law, and has given due notice to plaintiff of same, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and it is hereby removed to the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done and signed in open Court, this 28th day of February, 1918.
(Signed) E. K. SKINNER,
Judge.

Answer to Plaintiff's Petition.

Filed June 12, 1918.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. —.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Now into Court through its undersigned counsel comes Western Union Telegraph Company, made defendant herein, and for answer to the petition of Esteve Brothers & Company says:

12 I.

Defendant admits the allegations contained in the first paragraph of plaintiff's petition

II.

Answering the allegations contained in the second paragraph of plaintiff's petition, defendant avers that said cable was duly transmitted by the Central Office of the Telegraph Administration at Barcelona, Spain, to Paris, France, and thence was transmitted by the system of telegraphs owned and operated by the French Government to Havre, France and was there delivered to defendant for transmission by it to New Orleans, Louisiana. Same as hereinabove set forth, defendant denies all and singular the allegations contained in the second paragraph of plaintiff's petition.

III.

Answering the allegations contained in the third paragraph of plaintiff's petition, defendant says that it admits that in the course of transmission over its lines the said message through error was altered so as to read:

"Esteve Brothers,
New Orleans:

Sell two thousand bales futures naming equivalent New Orleans price.
(Signed) ESTEVE."

And that said message as thus altered was delivered to Esteve Brothers at New Orleans. Save as hereinabove admitted defendant denies all and singular the allegations contained in the third paragraph.

13 IV.

Answering the allegations contained in the fourth paragraph, defendant says that it admits that the cable as delivered at New Orleans read two thousand bales instead of two hundred bales, but avers that the error in changing the words "two hundred" to "two thousand" occurred in the course of transmission between New York and New Orleans.

V.

Answering the allegations contained in the fifth paragraph, defendant says that it is not possessed of sufficient information to justify a reasonable belief in regard thereto, and therefore, on information and belief, denies all and singular the allegations therein contained.

VI.

Answering the allegations contained in the sixth paragraph, defendant says that it admits that on September 15th, 1917, plaintiff sent the cable set forth in said paragraph. Defendant is not possessed of sufficient information to justify a reasonable belief as to the other allegations contained in the said paragraph, and, therefore, on information and belief, denies all and singular the other allegations therein contained.

VII.

Answering the allegations contained in the seventh paragraph, defendant says that it admits that on September 26th, 1917, petitioner received the cable from Barcelona set forth therein. Defendant is not possessed of sufficient information to justify a reasonable belief as to the other allegations contained in said
14 paragraph, and, therefore, on information and belief, denies all and singular the other allegations therein contained.

Further answering the allegations contained in said paragraph, defendant avers on information and belief, that said cable of September 15th, 1917, set forth in paragraph VI. of plaintiff's petition, was delivered to plaintiff at Barcelona in ample time for it to have advised its agency at New Orleans, long prior to September 26th, 1917, that the confirmation sale of two thousand bales was wrong and should have been two hundred bales, and defendant avers that it was incumbent upon petitioner, immediately upon being advised of said error, to have advised its New Orleans office thereof and that defendant can not in any event be held liable for any damages

sustained by plaintiff, if any were sustained, which is denied, which could have been prevented by plaintiff, immediately upon receipt of the cable of September 15th, 1917, advising its New Orleans office of the error in said sale.

VIII.

Answering the allegations contained in the eighth paragraph of plaintiff's petition, defendant says that it is not possessed of sufficient information to justify a reasonable belief in regard to the allegations therein contained, and, therefore, on information and belief, denies all and singular the allegations therein contained.

IX.

Answering the allegations contained in the ninth paragraph of plaintiff's petition defendant says that it is not possessed of sufficient information to justify a reasonable belief as to the truth of the allegations therein contained, and therefore, on information and belief, denies all and singular the allegations therein contained, and specially denies that petitioners sustained any loss as a result of the error in the transmission of said message of September 13th, 1917.

X.

Answering the allegations contained in the tenth paragraph of plaintiff's petition, defendant says that it denies all and singular the allegations therein contained.

XI.

Answering the allegations contained in the eleventh paragraph of plaintiff's petition, defendant says that it denies all and singular the allegations therein contained.

XII.

Further answering, defendant avers that the contract for the transmission of said cable of September 13th, 1917, from Barcelona, Spain, to New Orleans, Louisiana, was made in Barcelona, Spain, between plaintiff and the Central Office Telegraph Administration at Barcelona, Spain, which is a Department of the Government of Spain, and that the contract made by defendant for the transmission of said cable from Havre, France, to New Orleans, Louisiana, was made in Havre, France, and that defendant in transmitting said cable from Havre, France to New Orleans, Louisiana, was, under the law of Spain, acting as a public agent of the Government of Spain, and was, under the law of France, acting as a public agent of the Government of France, having been employed by each of said Governments as its agent to perform a governmental function, and that

under the law of Spain, the Spanish Government, and all agencies employed by it in transmitting cablegrams entrusted to said
16 Government, or its governmental agencies for transmission, and under the law of France, the French Government and all agencies employed by it in transmitting cablegrams entrusted to said Government, or its Governmental agencies for transmission, are exempt from liability for any loss occasioned through errors in the transmission or delivery of cablegrams, whether occurring through negligence or not, and that defendant is, therefore, not responsible for any loss that plaintiff may have sustained by the error in the transmission of said cablegram of September 13th, 1917.

XIII.

Further answering, defendant avers that even if there were any liability on its part to plaintiff for the error in the transmission of the said cable, which is denied, then said liability could not in any event exceed the proportion of the through tolls paid by plaintiff for the transmission of said cablegram from Barcelona, Spain to New Orleans, Louisiana, accruing to it, which amounted to $4.65, for the following reasons, to wit:

(*a*) That it was a term and condition of the contract, subject to which and subject to which only such message was delivered by plaintiff to the Central Office of the Telegraph Administration at Barcelona, Spain, and subject to which and subject to which only such message was accepted by the Central Office of the Telegraph Administration at Barcelona, Spain, and was also a term and condition of the contract, subject to which and subject to which only such message was delivered by the French Government to the defendant at Havre, France, and subject to which and subject to which only such message was accepted by the defendant at Havre, France; that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of
17 any unrepeated message, beyond the amount received for sending the same; and that the said message was an unrepeated message, and neither the Central Office of the Telegraph Administration at Barcelona, Spain, nor the French Government nor defendant was directed or requested to repeat the same and all that defendant received in exchange for its obligation in respect to the said message, was the sum of Four and 65/100 Dollars ($4.65), which was defendant's ordinary and reasonable charge for the transmission of such a message without repetition, from Havre, France, to New Orleans, Louisiana, including its delivery at destination.

(*b*) That such message was a foreign and an interstate message, to be sent from a point in France to a point in the State of Louisiana in the United States, through a number of the States of the United States, and was as such interstate and foreign commerce.

(*c*) That by defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18th, 1910, and are still

maintained and established, messages are classified among other classifications, into "repeated" and "unrepeated", a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc., that in any case of unrepeated messages defendant assumes no liability (except for gross negligence) beyond the amount received for sending the same, while in the case of repeated messages, defendant does not undertake to limit its liability, to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except insofar as such liability may be further limited by other provisions of the contract); and that
18 for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

(d) That by the Act of Congress approved June 18th, 1910, the Congress of the United States entered and assumed charge of regulating the field of interstate and foreign communication by telegraph, and thereby removed and exempted such interstate and foreign communication by telegraph from the field of state regulation or interference and undertook to, and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of the telegraph companies engaged in interstate and foreign commerce, with reference to such interstate and foreign commerce, and particularly conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

(e) That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognize the right of the defendant to charge a higher rate for a greater liability and lower rate for a less liability, as above described.

By reason of which and of all the premises, the defendant says that
19 the stipulation in the contract subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of Four and 65/100 Dollars ($4.65), was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Louisiana, or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of Four and 65/100 Dollars ($4.65), with interest from the sixteenth day of February, 1918.

Wherefore, defendant prays that after due proceedings had, there be judgment in its favor and against petitioner dismissing its suit at its cost.

And for all general and equitable relief.

(Signed) HOWE, FENNER, SPENCER & COCKE,
Attorneys for Defendant.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, Esmond Phelps, who being by me first duly sworn, declared

That he is a member of the law firm of Howe, Fenner, Spencer & Cocke; that said firm are the attorneys for the Western Union Telegraph Company, defendant in the above entitled and numbered cause, that he has read the foregoing answer and that all of the allegations and denials of fact therein contained are true and correct to the best of his knowledge, information and belief.

(Signed) ESMOND PHELPS.

Sworn to and subscribed before me, this 12 day of June, 1918.

[SEAL.] (Signed) PIERRE D. OLIVIER,
Notary Public.

20 *Note of Evidence.*

Filed Feb. 19, 1920.

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH CO.

Proceedings Had in the Above Entitled and Numbered Cause in Open Court Before the Honorable Rufus E. Foster, Judge, United States District Court, Eastern District of Louisiana, on the 12th Day of February, 1920.

Appearances:

M. M. Lemann, Esq., for the Plaintiff.
Esmond Phelps, Esq., for the Defendant.

Offer.

Mr. Lemann, counsel for plaintiff offered in evidence, subject to the objections to be immediately stated, the agreed statement of facts between counsel for plaintiff and defendant.

Objection.

Mr. Lemann: We object to the offer of evidence contained in said stipulation regarding the filing of tariffs, schedules and forms of the Interstate Commerce Commission, on the ground that the same are immaterial, irrelevant and incompetent.

The Court: I overrule the objection.

21 Mr. Lemann: To which ruling of the Court I except and reserve a bill.

Objection.

Mr. Lemann: We object to the offers contained in said stipulation as to division of rate between the Western Union Telegraph Company and the other lines over which this message passed, on the ground that the same is immaterial, irrelevant and incompetent.

The Court: I overrule the objection.

Mr. Lemann: To which ruling I except and reserve a bill.

Mr. Phelps: We join in the offer, except as to paragraph 7 of said stipulation concerning the question of damage that was sustained by the plaintiff, and we object to paragraph 7 on the ground that the facts therein stated are irrelevant and immaterial, inasmuch as to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to-wit the amount of the portion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message would be in contravention of Article 1, Section 8, subdivision 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approval June 18, 1910.

The Court: I overrule the objection.

22 Mr. Phelps: I except and reserve a bill to the ruling of the Court.

Offer.

Mr. Phelps: I specially offer the documents referred to in said stipulation and marked Exhibits A, B, C and D, same being respectively abstract from the minutes of the Western Union Telegraph Company, Executive Committee meeting of May 2nd, 1916, the form of cable of the Western Union Telegraph Company, and the tariff book of the Western Union Telegraph Company, which will be identified by the signature of counsel.

Objection.

Mr. Lemann: I object to the offer on the ground that the same is immaterial, irrelevant and incompentent.

The Court: I overrule the objection.

Mr. Lemann: To which ruling I except and reserve a bill.

Offer.

Mr. Lemann: I will offer the report of the Interstate Commerce Commission for the year 1911, being the Twenty-fifth Annual Report, particularly pages 5 and 6 thereof.

Mr. Lemann: I now move that your Honor direct a verdict for the plaintiff for the amount set out in the Statement here, which is slightly different from the amount in the petition, $31,095.00.

23 Mr. Phelps: I move the Court to direct a verdict in favor of the plaintiff in the sum of $4.65, with interest at 5% from September 13, 1917, basing said amount on the following grounds, that to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

The Court: I will deny the motion of the defendant and grant the motion of the plaintiff.

Mr. Phelps: I except and reserve a bill to the ruling of the Court, and ask to have the stipulation, together with all the documents annexed thereto made part of this bill.

Mr. Phelps: Counsel for defendant requests, in view of the fact that the present term will be at an end within the next three or four days, that the Court shall grant a period of sixty days within which to prepare bills of exception petition and assignment of errors in connection with the appeal.

The Court: I will allow you sixty days within which to prepare your bill of exceptions petition and assignment of errors.

24 *Charge of the Court.*

GENTLEMEN:

You may be interested in this case, and I will tell you what it is. The only question in the case, gentlemen, is as to whether or not the tariffs and forms limit the liability of the telegraph company on an unrepeated message to the amount paid for sending the message, whether these tariffs and forms being filed with the Interstate Commerce Commission are binding on the plaintiff in this case. The

message was originally sent from Barcelona, in Spain, and the form stipulated in the tariffs and on file with the Interstate Commerce Commission was not used, and my ruling is that the sender was not bound by these forms and tariffs on file with the Interstate Commerce Commission in the United States, that, therefore, the plaintiff can recover his actual damages, the case arising out of the missending of a cable regarding the sale of cotton futures.

Stipulation of Facts.

Filed Feb. 12, 1920.

In the United States District Court for the Eastern District of Louisiana.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Stipulation of Facts.

I.

It is admitted that on September 13th, 1917, the plaintiff deposited in the central office of the Telegraph Administration, which is owned and operated by the Spanish Government at Barcelona, Spain, for transmission to New Orleans, Louisiana, a message reading as follows:

"Esteve Bros.,
New Orleans:

Sell two hundred bales futures naming equivalent New Orleans October price.
(Signed) ESTEVE."

II.

It is admitted that the said message was correctly transmitted by the Central Office of the Telegraph Administration at Barcelona, Spain, to Paris, France, and was correctly transmitted by the system of telegraphs owned and operated by the French Government from Paris, France, to Havre, France, and was there delivered to the defendant's cable system, over which it was transmitted correctly to New York City, where it was turned over to the defendant's land line system for transmission between New York City and New Orleans, La. for delivery at New Orleans.

III.

It is admitted that this message was properly transmitted by the defendant over its cable system from Havre, France, to New York City, N. Y., and was turned over reading correctly to the defendant's land line system at New York City, for transmission to and delivery at New Orleans, Louisiana, and that an error occurred in the transmission thereof between New York City, and New Orleans, Louisiana, whereby the word "hundred" was changed to "thousand"; and that the message was delivered by the defendant to the plaintiff's office in the City of New Orleans, Louisiana, reading:

"Esteve Bros.,
New Orleans.

Sell two thousand bales futures naming equivalent New Orleans October price.
(Signed) ESTEVE."

26 IV.

It is admitted that the document attached hereto and made part hereof, marked Exhibit "A", signed by counsel for identification, is a true and correct copy of a resolution adopted by the Executive Committee of the defendant on May 2d, 1916, the said Executive Committee being a Committee of the Board of Directors of the defendant, with full powers to act for and on behalf of the entire Board in such matters; that in the month of May, 1916, defendant acting under the authority of this resolution filed with the Interstate Commerce Commission, its classification of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and that all of the said documents and forms have been since May 2d, 1916, and still are, on file with the Interstate Commerce Commission, and no changes therein have been made. Copies of the said documents so filed with the Interstate Commerce Commission are hereto annexed and made a part hereof, and marked "Exhibits" B, C," etc.

It is further admitted that there is no rule or regulation adopted by the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks, or forms of telegraph or cable companies.

It is further admitted that none of the defendant's aforesaid forms or blanks were used at any time in the receiving or transmission of the aforesaid message.

It is further admitted that plaintiffs have their main office in Barcelona and would testify that they had no actual information as to the resolution of the defendant or the filing of any forms, blanks, tariffs or schedules with the Interstate Commerce Commission.

27

V.

It is admitted that some time prior to June 18, 1910, and up to and including the month of September 1917, the rate charged for a non-repeated message between Barcelona, Spain and New Orleans, Louisiana, was forty-four (44c.) cents per word, which charge was made up of six (6c.) cents per word over defendant's land line system between New York City and New Orleans, Louisiana, and twenty-five (25c.) cents per word over its cable system between New York City and Havre, France, and thirteen (13c.) cents per word over the following lines, thirteen (13c.) cents being the rate exacted by and paid to the French and Spanish Government telegraph system for the handling of messages over their lines between Barcelona, Spain, and Havre, France, this rate not being a joint rate but the sum of the local rates of each of the three connecting systems over which the message passed.

It is also admitted that all cablegrams turned over to defendant's land line system by its cable system are handled as land line messages, except that the charge therefor is based upon the number of words in the body of the message, and also on the address and signature; whereas, in the case of ordinary land line messages, the charge is based solely on the number of words in the body of the message.

VI.

It is admitted that the amount paid by the plaintiff to the Spanish Telegraph Administration at Barcelona, Spain, for the transmission of the message from Barcelona, Spain, to New Orleans, Louisiana, in the manner heretofore described was Six Dollars and Sixty Cents ($6.60), of which the defendant subsequently received Four Dollars and Sixty-five cents ($4.65) for transmitting the message from Havre, France, to New Orleans, Louisiana, of which Three
28 Dollars and Seventy-five Cents ($3.75) was apportioned in accordance with the tariff to the transmission from Havre to New York and Ninety Cents ($0.90) to transmission from New York to New Orleans, and that the amount so received is the amount specified in its Tariff Book on file with the Interstate Commerce Commission, and is the amount specified in the said tariff for the transmission without repetition of a message containing the number of words contained in the message sued on, and its delivery at New Orleans, Louisiana.

It is further admitted that the plaintiff made no request to have the message in question repeated, and that had the plaintiff requested the repetition of the said message, it would have been required to pay an additional rate. It is further admitted that it is not usual to ask that messages be repeated.

VII.

It is further admitted that immediately upon receipt of the cable of September 13, 1917, plaintiff's New Orleans office sold two thou-

sand (2,000) bales of futures at 19.57 cents per pound, and immediately on September 15, 1917, advised plaintiff's Barcelona office by cable sent over defendant's lines that it had done so. It is further admitted that immediately upon receipt of the cable of September 15, 1917, plaintiff's Barcelona office advised the New Orleans office by cable sent over defendant's lines that the order was for two hundred (200) instead of two thousand (2,000) bales, and that immediately upon receipt of this cable of correction, plaintiff's New Orleans office repurchased eighteen hundred (1,800) bales of cotton for future delivery in January at 23.01c. per pound, as compared with the selling price of 19.57c. per pound, resulting in a loss of
Thirty Thousand, Nine Hundred Sixty Dollars ($30,-
29 960.00), together with commissions of One Hundred and
Thirty-five and no/100 dollars ($135.00), making a total of Thirty-one Thousand, and Ninety-five and no/100 ($31,095.00) Dollars, which amount has been actually paid out in cash and lost by plaintiff as the result of the error in the transmission of the cable of September 13, 1917.

VIII.

It is hereby stipulated and agreed between Messrs. Hall, Monroe & Lemann, Attorneys for the plaintiff, Esteve Brothers, and Messrs. Spencer, Fenner, Gidiere & Phelps, Attorneys for the defendant, Western Union Telegraph Company, that the facts hereinbefore stated shall be taken as true, and shall have the same force and effect as though established by competent testimony, provided, however, that either party shall have the right to raise the question of the admissibility of any or of all of the facts herein set forth in this suit, and to urge any and all legal objections thereto.

The right is reserved to either party to adduce evidence not inconsistent with any of the facts hereinbefore stated, but neither party shall have the right to adduce evidence inconsistent therewith.

(Signed) HALL, MONROE & LEMANN,
Attorneys for Esteve Brothers.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Western Union Telegraph Company.

30 EXHIBIT "A."

Filed Feb. 12, 1920.

Extract of Minutes of the Western Union Telegraph Company, Meeting Executive Committee, May 2nd, 1916.

The President reported that he is advised by Counsel that the Interstate Commerce Commission has granted permission to the Telegraph Company to file its tariff book with the Commission for information; also its regulations respecting the transmission of mes-

sages, and its forms of message blanks showing the conditions attaching to the different classes of messages. The President also stated that Counsel has advised that the Executive Committee approve the filing of such documents, and the regulation and classification of messages as so filed.

Whereupon, it was

Resolved, that the classification of messages, the forms and the rules and regulations respecting the transmission of messages as indicated in the tariff book of the company and the conditions and stipulations as shown upon the message forms, be and the same are hereby approved by this Committee, and that the President be authorized to file the same with the Interstate Commerce Commission.

A true copy from the Minutes.

(Signed) ANDREW T. BURLEIGH,
[SEAL.] *Secretary.*

Esteve v. Western Union, Exhibit A. S. F. G. & P., Attys. for Deft. H. M. & L., Attys. for Pltff.

31 EXHIBIT B.

Filed February 12, 1920.

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Telegram.

Class of service desired. Fast Day Message. —. Day Letter. —. Night Message. —. Night Letter. —.

Newcomb Carlton, President. George W. E. Atkins, first Vice-President.

Patrons should mark an X opposite the class of service desired; Otherwise the Telegram will be transmitted as a fast day Message.

Form 1206.

Receiver's No. —. Check —. Time Filed —.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

All Telegrams taken by this Company are subject to the following terms:

To guard against mistakes or delays, the sender of a telegram should order it repeated, that is telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram

rate is charged in addition, unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

32 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any Repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the workings of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

33 5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the following terms.

8. No employee of the Company is authorized to vary the foregoing.

THE WESTERN UNION TELEGRAPH COMPANY, INCORPORATED,
NEWCOMB CARLTON,
President.

Classes of Service.

Fast Day Messages.

A full-rate expedited service.

Night Messages.

Accepted up to 2.00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

Day Letters.

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-
34 fifth of the initial rate for each additional 10 words or less.

Special Terms Applying to Day Letters.

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

35 Night Letters.

Accepted up to 2.00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

Special Terms Applying to Night Letters.

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing

36 EXHIBIT "C."

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Cablegram.

Newcomb Carlton, President, George W. E. Atkins, First Vice-President.

Class of Service Desired: Full Rate. —. Half Rate Deferred. —. Cable Letter. —. Week End Letter. —.

Patrons should mark an X opposite the class of service desired: Otherwise the Cablegram will Be Transmitted at full rates.

Form 2903.

Number —. Time Filed, —. Number of Words, —.

Send the following Cablegram, subject to the terms on back hereof, which are hereby agreed to.

All Messages taken by this Company are subject to the following terms:

To guard against mistakes or delays the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-quarter the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face this is an unrepeated cable message and paid for as such.

37 This Company will not assume any responsibility concerning any message beyond the terminus of its own lines. It is agreed between the sender of the following message and this Company, that this Company shall not be liable for mistakes or delays in transmission or delivery, nor for non-delivery to the next connecting telegraph company, or to the addressee, of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to this Company; and that this Company shall not be liable for mistakes in the transmission or delivery, nor for delay or non-delivery to the next connecting telegraph Company, of any repeated message, beyond fifty times the extra sum received by this Company from the sender for repeating such message over its own lines; and that this Company shall not be liable in any case for delays arising from interruption in the working of its lines, nor for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

It is agreed that this Company shall not be liable for damages in any case where the claim is not presented to it in writing within sixty days after the message is filed with this Company for transmission.

No employee of the Company is authorized to vary the foregoing.

THE WESTERN UNION TELEGRAPH
COMPANY, INCORPORATED.
NEWCOMB CARLTON,
President.

Classes of Service.

Full Rate.

An expedited service throughout. Code language permitted.

38 Deferred Half Rate.

Half rate messages are subject to being deferred in favor of full rate messages for not exceeding 24 hours. Must be in language of country of origin or of destination, or in French. This class of service is in effect with most European countries and with various other countries throughout the world. Full particulars supplied on application at any Western Union Office.

Cable Letters.

For plain-language communications. The language of the country of destination may be employed, if the cable letter service is in operation to that country. Subject to delivery at the convenience of the company within 24 hours if telegraphic delivery is selected. Delivery by mail beyond London will be made if the prefix C.L.P. is written before the address. Rate between New York, Boston, Halifax or Montreal and London or Liverpool, 75c. for 13 words including necessary prefix and 5c. for each additional word. Rates from interior points slightly higher.

Week End Letters.

Similar to Cable Letters except that rate between New York and the other places mentioned is $1.15 for 25 words including the necessary prefix. Excess words 5c. each. Must be filed before midnight Saturday for delivery Monday morning, if telegraphic delivery is selected.

39 *Hearing and Verdict.*

Extract from the Minutes.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & CO.

vs.

WESTERN UNION TELEGRAPH COMPANY.

This cause was this day called for trial.

Present:

Monte M. Lemann, of counsel for plaintiff.
Esmond Phelps, of counsel for defendant.

Whereupon, the following named jurors were called and sworn to well and truly try the issue joined herein, to wit:

1. D. Britton North, 2. Leon Irwin, 3. Arthur O'Connor, 4. Daniel L. Ryan, 5. Frank V. Moise, 6. Albert Godchaux, 7. Thos.

I. Galbreth, 8. Geo. B. Friedrichs, 9. Leonce Bergeron, 10. Emanuel Engel, 11. Jos. J. Levins, 12. Gaston Lanaux,

and the trial was proceeded with;

After hearing the pleadings and evidence offered on behalf of the respective parties, counsel for plaintiff moved the Court to direct the jury to find a verdict in favor of the plaintiff upon the grounds urged, and counsel for defendant also moved the Court for instructions upon the grounds urged, and after hearing arguments of counsel for the respective parties on said motions to direct verdicts, and on due consideration thereof, the Court granted the motion of plaintiff and directed the jury to find a verdict in favor of the plaintiff, and refused defendant's motion to direct; counsel for defendant reserving bills of exception to the rulings of the Court granting the motion of plaintiff to direct a verdict in their favor and also to the refusal of the Court to grant defendant's instructions;

Thereupon, after hearing the instructions of the Court, and under said instructions, the jury did then and there, in open Court, in presence of counsel for the respective parties, through their foreman, Daniel L. Ryan, render and deliver the following verdict, to wit:

New Orleans, February 12, 1920.

We, the Jury, find a verdict in favor of the Plaintiff and against the Defendant, the Western Union Telegraph Co., for the sum of Thirty-one thousand and Ninety-five dollars ($31,095.00) with legal interest from Feby. 16, 1918.

DANIEL L. RYAN,
Foreman.

Whereupon, on motion of counsel for the plaintiff, it was ordered by the Court that the said verdict be recorded, and it is done accordingly; and it was further ordered that the said jury be discharged from further consideration of the cause.

41 *Judgment.*

Extract from the Judgment Book.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

By reason of the verdict of the jury herein rendered, and in accordance therewith;

It is ordered, adjudged and decreed that the plaintiff, Esteve Brothers & Company, do have and recover of and from the defendant, Western Union Telegraph Company, the full sum of thirty-one thousand and ninety-five and 00/100 ($31,095.00) dollars, with legal interest thereon from February 16th, 1918, until paid, together with all costs of suit.

Judgment rendered February 12, 1920.
Judgment signed February 14, 1920.

(Signed) RUFUS E. FOSTER,
Judge.

42 *Order Allowing Defendant 60 Days to Prepare and Present Bills of Exceptions.*

Extract from the Minutes.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & CO.
vs.
WESTERN UNION TELEGRAPH COMPANY.

On motion of Esmond Phelps, of counsel for defendant herein
It was ordered by the Court that the said defendant be allowed

sixty (60) days from this date as time in which to prepare and present its bills of exceptions taken in this cause.

43 *Petition for Writ of Error and Order.*

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Telegraph Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on 12th day of February, 1920, comes now by Spencer, Fenner, Gidiere & Phelps, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States Circuit Court of Appeals for the Fifth Circuit, under, and according to the laws of the United States in this behalf made and provided, and also that an order be made, fixing the amount of security which defendant shall give and furnish upon said writ of error, and that, upon the g'ving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

And your petitioner will ever pray.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant.

44 *Order.*

Upon motion of Spencer, Fenner, Gidiere & Phelps, attorneys for defendant, and upon filing a petition for a writ of error, and assignment of errors,

It is ordered that a writ of error be, and it is, hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment heretofore entered herein, and that the amount of said bond on said writ of error be, and hereby is, fixed at Forty-thousand ($40,000) Dollars, the same to act as a supersedeas bond.

(Signed) RUFUS E. FOSTER,
Judge.

Assignment of Errors.

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Comes now Western Union Telegraph Company, defendant in the above entitled and numbered cause, and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

45 (1) That the Court erred in overruling the objection of defendant as to the admissibility of the facts stated in paragraph 7 of the stipulation of facts relative to the damages sustained by plaintiff, for the reason that said facts were irrelevant and immaterial inasmuch as the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

(2) The Court erred in granting the motion to *retain* a verdict in favor of plaintiff in this cause for $31,095.00, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules, and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls

received by defendant; and therefore, to hold defendant
46 liable in this case beyond said amount contravenes Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

(3) The Court erred in overruling the motion of the defendant that the Court direct a verdict in favor of plaintiff in the sum of $4.65 with interest at the rate of five per cent, (5%) from September 13, 1917, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65 for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with an approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

Wherefore, Plaintiff in error prays that the judgment of said Court be reversed, etc.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant in Error.

47 *Bill of Exceptions.*

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

This was an action at law to recover the sum of Thirty-one thousand, Seven hundred twenty-five ($31,725) Dollars damages alleged to have been caused by an error in the transmission of a cablegram sent from Barcelona, Spain, by plaintiffs addressed to themselves at New Orleans, Louisiana.

The case came regularly on for trial on the 12th day of February, 1920, before Honorable Rufus E. Foster, district judge, M. M. Lemann, Esq., appearing as counsel for plaintiff, and Esmond Phelps, Esq., appearing as counsel for defendants.

A jury having been impaneled, the following proceedings were had:

Counsel for plaintiff offered in evidence an agreed statement of facts signed by counsel for the respective parties, which was as follows:

Agreed statement of facts omitted from the printed record, being *hereto* copied at page 24.

* * * * * * *

48 Exhibit "A" referred to in said statement was a copy of the resolution adopted by the Executive Committee of the defendant, authorizing and directing the filing of its tariffs and schedules with the Interstate Commerce Commission.

Exhibit "B" was the form of cablegram in use by defendant and filed by it with the Interstate Commerce Commission, and this form contained the following stipulation:

"To guard against mistakes or delays, the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-quarter the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message and paid for as such. It is agreed between the sender of the following message and this Company, that this Company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this Company."

Exhibit "C" referred to in said stipulation was the regulation form of land line message in use by defendant, and on file with said Interstate Commerce Commission, and which contained the following provisions:

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this Company as follows: The Company shall not be liable for
49 mistakes or delays in the transmission or delivery of any unrepeated message beyond the amount received for sending the same."

Exhibit "D" referred to in said stipulation was the Tariff Book containing the rates applicable for the transmission of cables and telegrams between various points in the United States and foreign countries including the transmission of cables between Barcelona Spain, and New Orleans, Louisiana, and the transmission of tele

grams between New York, N. Y., and New Orleans, Louisiana, and also, the rules and regulations of said Company. The rates specified in said Tariff Book were for the transmission of unrepeated messages, and it was provided therein that, in case a message was ordered repeated, an extra charge therefor should be made.

Upon the offering of said stipulation by counsel for plaintiff, counsel for defendant objected to the offering of paragraph 7 thereof on the ground "that the facts therein stated are irrelevant, and immaterial, inasmuch as to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $1.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910."

The Court overruled this objection, and counsel for defendant then and there duly excepted to said ruling of the Court and hereby tender this their bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same.

50 Thereafter counsel for plaintiff moved the Court to direct a verdict for plaintiff in the sum of Thirty-one thousand and nine-five ($31,095) Dollars, and counsel for defendant at the same time moved the Court to direct in favor of plaintiff in the sum of $1.65, with interest at five per cent. (5%) from September 13, 1917, on the following grounds,

"That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $1.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 19, 1910."

The Court thereupon denied the motion of defendant and granted the motion of plaintiff, and counsel for defendant then and there duly excepted to the ruling of the Court, and hereby tender this their bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same.

The jury then brought in a verdict in favor of plaintiff for damages in the sum of Thirty-one thousand and ninety-five ($31,095) Dollars.

And now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this

case, and prays that the same may be settled and allowed, and signed and certified by the Judge, as provided by law.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant.

51 Settled and allowed, this 19 day of February, 1920.

(Signed) RUFUS E. FOSTER,
Judge.

Appeal Bond.

Filed February 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Know all men by these presents that we, Western Union Telegraph Company, and American Surety Company of New York as surety, are held and firmly bound unto Esteve Bros. in the full and just sum of Forty thousand ($40,000) Dollars, to be paid to the said Esteve Bros., their attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and dated this 19th day of February, 1920.

Whereas lately at a regular term of the District Court of the United States for the Eastern District of Louisiana, sitting at New Orleans, in said district, in a suit pending in said Court between Esteve Bros. as plaintiff and Western Union Telegraph Company as defendant, No. 15830, on the law docket of said Court, final judgment was rendered against the said Western Union Telegraph Company for the sum of Thirty-one thousand and ninety-five

52 ($31,095) Dollars, with interest at the rate of five per cent. (5%) and the said Western Union Telegraph Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said Esteve Bros. defendant in error, citing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans in the State of Louisiana, according to law within thirty (30) days from the date hereof.

Now the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute its writ of error

to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

WESTERN UNION TELEGRAPH CO.,
(Signed) By SPENCER, FENNER, GIDIERE & PHELPS, *Its Attys.*
AMERICAN SURETY COMPANY OF NEW YORK,
(Signed) By CHAS. HOFFMANN,
Resident Vice-President.

Attest.
(Signed) C. MURPHY,
Resident Assistant Secretary.

Approved this the 19 day of February, 1920.
(Signed) RUFUS E. FOSTER, *Judge.*

53 *Praecipe for Transcript.*

Filed Feb. 19, 1920.

Spencer, Fenner, & Phelps,
Counsellors at Law,
United Fruit Company Building,
708 Union Street,

New Orleans, February 18, 1920.

Walker B. Spencer, Charles Payne Fenner, Philip S. Gidiere, Esmond Phelps, Charles E. Dunbar, Jr.

Henry J. Carter, Esq., Clerk,
United States District Court,
City:

DEAR SIR:

In making up the transcript in connection with the writ of error taken in the case of Esteve Bros., vs. Western Union Telegraph Company, No. 15830, United States District Court for the Eastern District of Louisiana, please include therein the following:

(1). The petition, the petition for removal and the order of removal.

(2). The answer of defendant.

(3). The agreed statement of facts, and the exhibits A, B, and C offered in connection therewith, same being, respectively, the certified copy of the resolutions of the executive committee of defendant; the form of cable message; and the form of land line message.

54 (4). The proceedings had upon the trial of the cause, as embodied in the notes of the stenographer, together with the verdict of the jury and the judgment rendered thereon.

(5). The petition for writ of error; the assignments of error; the bill of exceptions, and the orders rendered in connection therewith; and the appeal bond.

(6). We do not desire exhibit D, which is the Tariff Book of defendant, included in the transcript; as same will, by agreement of counsel, be sent up in the original.

We desire exhibits B and C both included in the transcript of appeal, and, also, sent up in the original.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Western Union Telegraph Company, Defendant.

H. J. C. 2-18-20.

We agree to the foregoing, and, particularly, the sending up of the documents specified in the original. It is understood that the report of the Interstate Commerce Commission offered in evidence need not be included in the transcript but shall be noticed by the appellate Court.

(Signed) HALL, MONROE & LEMMANN,
Attorneys for Esteve Bros., Plaintiff.

55 UNITED STATES OF AMERICA,
District Court of the United States:

Clerk's Office.

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 47 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of "Esteve Brothers & Company, versus Western Union Telegraph Company," No. 15,830 of the Docket of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division (made in accordance with the præcipe for transcript, copied herein.)

Witness my hand, and the seal of the said Court, at the City of New Orleans, State of Louisiana, this 28th day of February, A. D. 1920.

[SEAL.] H. J. CARTER,
Clerk.

Writ of Error and Citation omitted from the printed record, being filed in the original.

* * * * * * *

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of April 7th, 1920.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY

versus

ESTEVE BROTHERS & COMPANY.

On this day this cause was called, and, after argument by Rush Taggert, Esq., for plaintiff in error, and Monte M. Lemann, Esq., for defendant in error, was submitted to the Court.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Louisiana.

Rush Taggart and Esmond Phelps, (Spencer, Gidiere & Phelps, Rush Taggart, Francis Raymond Stark and Joseph Egan, on the brief), for Plaintiff in Error.
J. Blanc Monroe and Monte M. Lemann for Defendant in Error.

Before Walker, Circuit Judge, and Call and Hutcheson, District Judges.

WALKER, *Circuit Judge:*

This was an action by the defendants in error, (herein referred to as the plaintiffs), against the plaintiff in error, the Western Union Telegraph Company, (herein referred to as the defendant), for the alleged amount of the loss or damage occasioned to the former by the latter's negligent failure to transmit correctly a cable message addressed and sent on September 13, 1917, to the plaintiffs at New Orleans, Louisiana, by its representative at Barcelona, Spain, where the plaintiffs have their main office. The body of the message as sent read:

"Sell two hundred bales futures, naming equivalent New Orleans October price."

The body of the message as it was delivered by the defendant at New Orleans read:

"Sell two thousand bales futures naming equivalent New Orleans October price."

On the trial the following facts were admitted: The plaintiffs at Barcelona deposited the above mentioned message in the Central Office of the Telegraph Administration, which is owned and operated by the Spanish Government, for transmission to New Orleans. It was correctly transmitted by the Spanish Telegraph Administration to Paris, France, was correctly transmitted by the system of telegraphs owned and operated by the French Government from Paris to Havre, France, and was there delivered to the defendant, which transmitted it correctly by cable to New York City, and turned it over reading correctly to its land line system. An error occurred in the transmission of the message by the defendant from New York City to New Orleans, the word "thousand" being substituted for "hundred." The amount paid by plaintiffs to the Spanish Telegraph Administration at Barcelona for the transmission, in the above stated manner, of the message to its destination was $6.60, of which the defendant subsequently received $4.65 for transmitting it from Havre to New Orleans, of which $3.75 was apportioned to the transmission from Havre to New York and ninety cents to transmission from New York to New Orleans. Immediately upon receipt of the message as it read when delivered on the day it was sent the plaintiff's New Orleans office sold 2,000 bales of cotton for future delivery in January at 19.57 cents per pound, and on September 15th, 1917, advised its Barcelona office by cable sent over the defendant's lines that it had done so. Immediately upon receipt of that cable plaintiff's Barcelona office advised their New Orleans office by cable sent over the defendant's lines that the order was for 200 instead of 2,000 bales. Immediately upon receipt of the last mentioned cable plaintiff's New Orleans office bought 1,800 bales of cotton for future delivery in January at 23.01 cents per pound, resulting in a loss to the plaintiffs of $31,095, that being the aggregate of the difference between the price at which the plaintiffs sold 1,800 bales and the price at which it subsequently bought the same number of bales and the commissions paid. In the month of May, 1916, the defendant, acting through duly authorized representatives, filed with the Interstate Commerce Commission its classification of land line and cable messages and filing forms of such messages, together with the conditions under which the various classes of land line and cable messages are handled, and its tariffs and schedules, all which documents remained on file and unchanged at the time the message in question was sent. One of the classes of land line and cable messages so shown is unrepeated messages, as to which it was provided and shown on the filed forms that defendant was not liable for mistakes or delays in transmission or delivery or for non-delivery beyond the amount received for sending the same, the tariff rates for unrepeated messages being

less than such rates for repeated messages. The amount paid for sending the message in question was the rate called for by such filed tariff for an unrepeated message from Barcelona, Spain, to New Orleans, Louisiana. The plaintiffs did not request to have the message in question repeated. If they had so requested, they would have been required to pay a higher rate. It is not usual to ask that such messages be repeated. The plaintiffs had no actual information of the filing by the defendant with the Interstate Commerce Commission of any forms, blanks, tariffs or schedules. None of those forms or blanks were used at any time in the receiving or transmission of the message in question. The Interstate Commerce Commission has not adopted any rule or regulation requiring the filing of any tariffs, schedules, blanks, or forms of telegraph or cable companies.

Exceptions were reserved by the defendant to the action of the court in granting a motion of the plaintiffs to direct a verdict in their favor for the sum of $31,095.00, and in refusing a motion of the defendant that it direct a verdict in favor of the plaintiffs in the sum of $4.65, with interest at five per cent from September 13, 1917.

There was no evidence tending to prove that in any way the plaintiffs were made aware that the payment of more than was charged and paid for the transmission of the message was required to make the defendant liable to the plaintiffs for the loss or damage sustained by the latter in consequence of such a breach of duty as the one alleged and admitted. No evidence adduced would support a finding that the plaintiffs consented to the limitation of liability claimed by the defendant. What was disclosed was the tender and acceptance of the message for transmission unaccompanied by any stipulation or condition as to the liability thereby incurred. From the acceptance, in the manner disclosed, of the message for transmission and delivery it is not to be inferred that there was an understanding between the parties to the transaction that the service was undertaken on a condition limiting a carrier's liability for a default. The rate charged and paid was, unknown to the plaintiffs, less than the defendant's customary one for such a service when liability is not limited to the amount paid by the sender; but in no way did the plaintiffs assent to a limitation of the defendant's liability. The case is one of a carrier of messages according preferential treatment to a sender without the latter's knowledge or consent, and not one of a carrier stipulating for a limitation of liability for a negligent failure to transmit correctly. The rate charged and paid could not have signified a limitation of the carrier's liability to a sender who was not aware or notified of the condition on which that rate customarily was given. The defendant relies on provisions of the Interstate Commerce Commission Act, (8 Comp. St. An. §§8563 et seq.), to sustain the contention that, though the plaintiffs were unaware that the rate charged and paid for the transmission of the message was the filed tariff rate for an unrepeated message, and that according to that tariff a higher rate was required to be paid to make the defendant liable for more than the amount paid for the service, the plaintiffs are deprived of the right to recover more than that amount by provisions contained in documents on

file with the Interstate Commerce Commission, of the existence and contents of which the plaintiffs had no knowledge or notice. Section 1 of that Act, as amended June 18, 1910, provides that the provisions of the Act shall apply to telegraph, telephone and cable companies, (whether wire or wireless), engaged in sending messages from one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of the Act; and that section contains the following provision:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Section 3 of the Act contains the following provision:

"It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever."

Amended section 15 of the Act empowers the Commission to determine and prescribe maximum rates for the transmission of messages by telegraph or telephone, and classifications, regulations or practices of companies subject to the Act and engaged in transmitting such messages. By amended section 20 of the Act the Commission is empowered to require annual reports from all common carriers subject to the provisions of the Act, and to prescribe forms of accounts required to be kept by such common carriers. At the time of the transaction in question the Commission had not, so far as telegraph, telephone, or cable companies are concerned, exercised any of the powers conferred on it by sections 15 and 20 of the Act. By their terms many of the provisions of the Act do not apply to telegraph, telephone, or cable companies. Among such inapplicable provisions are those requiring the adoption, filing and publication of rates for interstate or foreign transportation, and regulations in regard to such transportation, and prohibiting and penalizing departures by either carriers or shippers from rates or regulations so filed and published. The Act contains no requirement as to filing or publishing rates, classifications, rules or regu-

lations voluntarily adopted by telegraph, telephone, or cable companies.

The above quoted provision of Section 1 of the Act with reference to classification of messages by telegraph, telephone, or cable, and charging different rates for the different classes of messages, is a permissive, not a compulsory, one. It does not purport to give to the adoption and filing with the Commission of a classification by a carrier of such messages and of rates and regulations applicable to the different classes of messages the effect of binding a sender of a message by an adopted and filed regulation or provision of which the sender in no way is informed or notified. It does not purport to charge senders of messages with notice of classifications, rules, or regulations filed by the carrier with the Commission. It does not provide for a limitation of liability not contracted for by parties undertaking to transmit and deliver such messages. In the absence of a statutory or contractual modification of such liability the party in whose favor it is incurred, if there is a negligent failure to transmit the message correctly, is entitled to recover such damages as are the direct and natural result of that breach of duty, including special damages which the terms of the message disclose to be likely to result from such a default. Nothing in the last referred to provision affects the question of the extent of the carrier's liability for a negligent failure to transmit correctly a message tendered and accepted under circumstances furnishing no basis for the conclusion that the sender assented to any modification or limitation of the carrier's liability for such a default. The other provisions of the Act which must be relied on to support the contention made in behalf of the defendant are the above quoted ones of Sections 1 and 3 to the effect that charges for the transmission of messages by telegraph, telephone, or cable, or in connection therewith, shall be just and reasonable, unjust or unreasonable charges for such services being prohibited and declared to be unlawful; and that the giving of any undue or unreasonable preference or advantage, or the subjecting of any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever are prohibited. Obviously the legislative motive for the enactment of those provisions was to protect parties procuring the services of the carriers mentioned from exactions by such carriers of unjust or unreasonable charges for such services, and from being made the victims of undue or unreasonable discriminations against such parties and in favor of others having similar dealings with the carriers. It is not to be supposed that those provisions were intended to have the effect of enabling a carrier to escape liability for a breach of its undertaking to render a service in the line of the business in which it is engaged by showing that the party for whom that service was undertaken was, without the knowledge or fault of that party, charged less therefor than its reasonable value or than was exacted of others for similar services, or otherwise was accorded undue preferential treatment. The provisions were intended for the benefit of parties unjustly discriminated against, and were not intended to enable a

carrier to shield itself from the consequences of a breach of its obligation to a party who was an unconscious recipient of the carrier's preferential treatment. Before by amendment of the Act those provisions were made applicable to telegraph, telephone and cable companies, and before by amendment of the Act both interstate shippers and carriers of things and persons were required to conform to duly filed and published rates and regulations, the above quoted provisions of Sections 1 and 3 of the Act were in force and applicable to such carriers of persons and things. While the statute law was in the condition just indicated it did not, as to carriers then subject to its provisions, have such effect as is attributed to it in behalf of the defendant. In Merchants Cotton Press & S. Co., v. Insurance Company of North America, 151 U. S., 368, it was contended that the giving and acceptance of a rebate on a shipment of cotton rendered void the bills of lading issued by the carrier for the cotton, with the result that the carrier was not liable for the loss of the cotton. It was not shown that the consignees or owners knew of the rebate. In overruling that contention, the Court quoted with approval the following from the opinion of the court whose judgment was under review:

"We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability where it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced, but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence."

In deciding that under the law as it now is an interstate carrier is not liable under a stipulation in a shipping contract for a special service not provided for in its filed and published tariffs, the court was careful to point out that the question of the carrier being under such liability for the goods accepted for carriage as it lawfully could subject itself to was not presented for decision. Chicago & Alton Ry. Co., v. Kirby, 225 U. S., 155, 166. It seems that the reasons supporting the conclusion reached in the case of Merchants Cotton Compress & S. Co. v. Insurance Co., supra, that the allowance of an unlawful rebate did not enable the carrier to escape liability for the goods undertaken to be carried also would support the conclusion that the fact that there was an unlawful discrimination in favor of a sender of a telegraph or cable message would not enable the carrier of such message to escape liability for a negligent failure

properly to transmit it, where the discrimination in favor of the sender was without his knowledge or consent. The ground on which courts refuse to enforce contracts made in contravention of such statutes as those above mentioned is that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S., 597. That ground does not exist where the sender of a message, not by law chargeable with knowledge of the rate payable for the service he contracts for, unwittingly pays less than that rate for such service. The opinion in the case of Mobile & Ohio R. R. Co. v. Dismukes, 91 Ala., 131, well illustrates how such provisions as the above quoted ones of the Interstate Commerce Commission Act would be perverted from the purpose of their enactment by giving them the effect attributed to them in behalf of the defendant. It may be supposed that not infrequently an applicant for telegraphic or cable service would find conveniently at hand blank paper on which to write his message and would be charged the unrepeated message rate, without anything being said about a limitation of the carrier's liability, if the adoption of that method of dealing could result in the carrier's liability for a negligent failure to transmit correctly being limited to the amount paid by the sender. The injustice of such a result is obvious where neither the law nor the party contracting to render service makes adequate provision for notice to the party to be served of conditions on which the service is undertaken.

Under the Interstate Commerce Commission Act as it is now in force an interstate shipper is chargeable with notice of duly filed and published rates and conditions subject to which shipments at those rates are allowed, with the result that such a shipper is bound by a limitation of liability shown by the carrier's filed and duly published tariffs to be an incident of the rate charged. Boston & Maine R. R. Co. v. Hooker, 233 U. S., 97. But such a shipper was not forbidden to depart from rates or regulations adopted by a carrier, and subjected to penalties for so doing, until the law afforded him adequate means of ascertaining what those rates and regulations are, without having to depend upon such information in regard thereto as the carrier might choose to impart. The Act, as it was in force at the time of the transaction in question, did not require senders of interstate or foreign telegraph or cable messages to conform at their peril to rates or regulations adopted by carriers of such messages; and, in the absence of authorized action on the subject by the Commission, provided no means for the senders of such messages acquiring authentic information as to rates, classifications, or regulations adopted by such carriers. The senders of such messages have not been brought under the provisions of the Act as amended which bind an interstate shipper of goods to conform to duly filed and published rates and conditions applicable to his shipment, whether the shipper does or does not know of or assent to such rate and conditions. No provision of the Act purports to put it in the power of a carrier of messages by telegraph or cable to bind senders thereof by conditions not brought to the notice of the latter. Noth-

ing in the Act manifests an intention to deprive a sender of such a message, who is the unconscious and innocent recipient of forbidden preferential treatment at the hands of the carrier, of the right to enforce the liability incurred by the latter by a breach of its undertaking. In view of the facts just mentioned we are of opinion that nothing contained in the Act justifies the imputation to the law makers of the intention to give to the adoption by a carrier by telegraph or cable of interstate or foreign messages of rates, classifications, regulations, etc., and the filing thereof with the Commission, the effect of charging senders of such messages with notice of rates, classifications, regulations, etc., so adopted and filed, and of prohibiting and penalizing departures therefrom by such senders who actually and without fault on their part are uninformed in regard thereto. Assuming, without admitting, that the contract which resulted from the acceptance in Europe of the message in question for transmission and delivery could not be enforced by the senders if the Act would not permit the enforcement of such a contract made in this country, we are of opinion that nothing in that Act properly can be given the effect of enabling the defendant to limit its liability for the default alleged and admitted to the amount charged the plaintiffs for the service and paid by them without knowledge or notice that it was less than the amount customarily paid for such a service when no limitation of liability is stipulated for.

The question as to whether the defendant had a valid claim against the plaintiffs for the amount of the difference between what was paid and what is payable for the service when no limitation of the defendant's liability is stipulated for was not in any way raised. It is not contended that the plaintiffs were not damaged, as a proximate result of the default alleged and admitted, in the amount for which a verdict in their favor was directed; nor is it contended that the terms of the message failed to indicate that such damages might result from such a default.

The conclusion is that the court did not err in giving the instruction requested by the plaintiffs. The judgment on the verdict rendered in pursuance of that instruction is

Affirmed.

(Original filed May 26th, 1920.)

Judgment.

Extract from the Minutes of May 26th, 1920.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY

versus

ESTEVE BROTHERS & COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Western Union Telegraph Company, and the surety on the writ of error bond herein, American Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 56 to 70 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3506, wherein Western Union Telegraph Company is plaintiff in error, and Esteve Brothers & Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 55 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of July, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

72 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 3rd day of November, A. D., 1920, there was filed in my office a stipulation in the above entitled cause, in the following words, to wit:

"United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

ESTEVE BROTHERS & COMPANY, Defendant in Error.

It is hereby stipulated and agreed, between Messrs. Hall, Monroe & Lemann, Attorneys for Esteve Brothers & Company, Defendant in Error, and Messrs. Spencer, Fenner, Gidiere & Phelps, Attorneys for Western Union Telegraph Company, Plaintiff in Error, that the transcript of the record certified by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit and filed with the Clerk of the Supreme Court of the United States in connection with the application to said Court by the Western Union Telegraph Company for a writ of certiorari shall be taken as a return to the writ of certiorari issued by the Supreme Court of the United States, in the case entitled: "Western Union Telegraph Company, Petitioner, vs. Esteve Brothers & Company," No. 491, October Term, 1920,

73 of said Court.

(Signed) HALL, MONROE & LEMANN,
MONTE M. LEMANN,
Attorneys for Esteve Brothers & Company, Defendant in Error.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
ESMOND PHELPS,
Attorneys for Western Union Telegraph Company, Plaintiff in Error."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 3rd day of November, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.
By GEO. W. ROBERTSON,
Deputy Clerk.

74 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is plaintiff in error, and Esteve Brothers & Company is defendant in error, No. 3506, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do
75 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

76 [Endorsed:] File No. 27,848. Supreme Court of the United States, October Term, 1920. No. 491. Western Union Telegraph Company vs. Esteve Brothers & Company. Writ of certiorari. U. S. Circuit Court of Appeals. Filed Nov. 3, 1920. Frank H. Mortimer, clerk.

77 [Endorsed:] 491—27848. No. 3506. United States Circuit Court of Appeals for the Fifth Circuit. Western Union Telegraph Company, plaintiff in error, vs. Esteve Brothers & Company, defendant in error. Writ of certiorari and return thereto.

78 [Endorsed:] File No. 27,848. Supreme Court U. S. October Term, 1920. Term No. 491. Western Union Telegraph Co., pl'ff in error, vs. Esteve Brothers & Company. Writ of certiorari and return. Filed Nov. 6, 1920.

No. 491

AUG 17 1920

JAMES D. MAHER, CLERK

IN THE

Supreme Court of the United States

TERM.....

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAME.

SPENCER, FENNER, GIDIERE & PHELPS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Petitioner.

HAUSER PRINTING CO., "The Legal Printers," 720 Poydras St., N. O., La.

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IN THE

Supreme Court of the United States

TERM.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAME.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

To the Honorable the Supreme Court of the United States:

Your petitioner, Western Union Telegraph Company, respectfully petitions this Court that a writ of *certiorari* may be granted directing the Circuit Court of Appeals for the Fifth Circuit to certify to this Honorable Court for its review and determination the case of Western Union Telegraph Company, plaintiff in error, versus Esteve Brothers & Company, defendant in error, and for reasons therefor respectfully shows to this Honorable Court as follows:

THE VITAL QUESTION INVOLVED IN THIS APPLICATION IS THIS: ARE THE STIPULATIONS LIMITING LIABILITY FOR INTERSTATE AND FOREIGN TELEGRAMS, WHICH HAVE BEEN DULY ESTABLISHED BY TELEGRAPH COMPANIES IN PURSUANCE OF THE PERMISSION GRANTED BY THE ACT TO REGULATE COMMERCE, AND FILED WITH AND APPROVED BY THE INTERSTATE COMMERCE COMMISSION, APPLICABLE TO ALL TELEGRAMS ALIKE, OR ONLY TO SUCH TELEGRAMS AS ARE WRITTEN ON THE ORDINARY MESSAGE BLANKS IN WHICH THESE CONDITIONS ARE SET FORTH? IN OTHER WORDS, DOES THE SENDER OF THE MESSAGE WHO WRITES IT ON PLAIN PAPER, OR TELEPHONES IT TO THE TELEGRAPH OFFICE, SECURE A HIGHER MEASURE OF LIABILITY, IN EXCHANGE FOR THE SAME RATE, THAN HIS COMPETITOR WHO WRITES A SIMILAR MESSAGE ON THE USUAL SENDING BLANK?

FIRST. Respondent, a partnership composed of residents of Spain and of a resident of Savannah, Georgia, instituted suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against petitioner, a corporation organized under the laws of the State of New York, to recover the sum of Thirty-one Thousand, Seven Hundred Twenty-five Dollars ($31,725) as damages sustained by it by reason of an error in the transmission of a cablegram from Barcelona, Spain, to New Orleans, Louisiana. On proper petition and bond, petitioner removed its case from the State Court to the United States District Court for the Eastern District of Louisiana, on February 28, 1918. The petition for removal was based entirely on the ground of diversity of citizenship (Tr. p. 8). Thereafter, petitioner

filed an answer, in which it "*inter alia*" specially averred that its liability was restricted to the proportion of the tolls paid by respondent for the transmission of the message sued on which accrued to petitioner, or the sum of Four and 65-100 dollars ($4.65), for the reason that said message was an unrepeated message, and that under the rules, regulations and tariffs filed by it with the Interstate Commerce Commission under the Act of Congress of June 18, 1910, its liability for errors in unrepeated messages was restricted to the price received by it for transmitting such messages (Tr. pp. 16 to 18). The case was tried before a jury upon an agreed statement of facts. The motion of respondent for the direction of a verdict for the full amount of the loss shown by said statement of fact, to-wit, the sum of Thirty-one Thousand and Ninety Five Dollars, was granted by the Court, and the motion of petitioner to direct a verdict for Four and 65-100 Dollars, the proportion of the amount received by it for the transmission of the message, was denied. Petitioner's motion was based upon the following grounds:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to-wit: The amount of the proportion of the tolls accruing to the defendant, or the sum of Four and 65-100 dollars, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the Act of Congress approved June 18, 1910," (Tr. p. 23).

Exceptions were duly taken to the granting of respondent's request for a direction of a verdict and the refusal of petitioner's request, and the jury then brought in a verdict for Thirty-one Thousand and Ninety-five Dollars ($31,095), (Tr. p. 40), and judgment was rendered on February 12, 1920, for that amount (Tr. p. 41). From this judgment petitioner prosecuted a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit, and the said Circuit Court of Appeals on May 26, 1920, affirmed the judgment of the District Court.

SECOND. Your petitioner avers that the material facts in this case, as shown by the agreed statement of facts, (Tr. pp. 11 to 19), are as follows:

On September 13, 1917, respondent deposited in the office of the Telegraph Administration of the Spanish Government, at Barcelona, Spain, a cablegram addressed to its branch at New Orleans, Louisiana, directing the sale of Two Hundred (200) bales of cotton futures. The message was correctly transmitted from Barcelona, Spain, to Paris, France, where it was delivered to the telegraph lines of the French Government, which in turn transmitted it correctly and delivered it to petitioner's cable system at Havre, France, over which it was transmitted correctly to New York City, where it was turned over to petitioner's land line system for transmission between New York City and New Orleans, Louisiana. In the course of transmission between New York and New Orleans the word "hundred" was changed to "thousand," and respondent's New Orleans office accordingly sold two thousand bales of cotton futures. Immediately upon discovery of the mistake, respondent closed out the transaction at a loss of Thirty-one Thousand and Ninety-five Dollars ($31,095) due directly to the error in transmission.

In the month of May 1916, petitioner, acting under authority of its executive committee, filed with the Interstate Comerce Commission its classification of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and all of said documents have been ever since on file with the Interstate Commerce Commission. Said form of cable message contains the following provisions, (Tr. p. 36):

> "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a cable message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-quarter of the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message, and paid for as such. It is agreed between the sender of the following message and this company that this company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this company."

Said form of land line message contained the following provisions, (Tr. p. 31):

> "All telegrams taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram, and paid for as such. In considera-

tion whereof it is agreed between the sender and the telegraph company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated telegram beyond the amount received for sending the same."

No request was made by respondent for the repetition of said message. The amount paid by respondent for the transmission of said message was the amount specified in the tariff then on file with the Interstate Commerce Commission for the transmission without repetition of a message containing the number of words contained in the message sued on from Barcelona, Spain, to New Orleans, Louisiana. This rate was not a joint rate, but the sum of the local rates of each of the three connecting systems over which the message passed. Had respondent requested the repetition of said message, it would have been required to pay an additional amount for that portion of the route represented by defendant's lines. None of petitioner's aforesaid forms or blanks were used at any time in the receiving or transmission of said message.

THIRD. Your petitioner contends that under the Interstate Act, as amended by the Act of June 18, 1910, the rates, rules and regulations of telegraph and cable companies adopted in conformity with that Act have the same binding force and effect upon these companies and upon the public as the rates, rules and regulations contained in the tariffs filed with the Interstate Commerce Commission by common carriers by railroad; that petitioner was specifically authorized by the Act of 1910 to classify its messages into repeated and unrepeated messages, and to charge different rates therefor (Section 1); that the limitation for liability for error in transmission to the price of the message has always been recognized as a fundamental condition appertaining to

unrepeated messages; that this limitation was held valid by this Court more than a quarter of a century ago (*Primrose vs. Western Union*, 154 U. S., p. 1); that the unrepeated message rate has been recognized by this Court and by the Interstate Commerce Commission as the "basic" or "primary" rate; (*Primrose vs. Western Union, supra; Clay County Produce Co. vs. Western Union*, 44 I .C. C., 670); and that any person sending a telegram between the states of this country or from a foreign country to this country without making a request for its repetition, is limited in his recovery for damage caused by an error in transmission to the price of the message.

We submit that the refusal of the Circuit Court of Appeals to restrict recovery in this case to the price of the message is in the very teeth of the Interstate Commerce Act and of the decisions of this Court interpreting it. This Court has repeatedly declared that the public are bound by the rates, including limitations of liability which are an essential part thereof, regardless of knowledge, assent or even misrepresentation. (*Gulf, Colorado & Santa Fe Railway vs. Hefley*, 158 U. S., 98; *Texas & Pacific Railway Co. vs. Mugg*, 202 U. S., 242; *Boston & Maine Railroad vs. Hooker*, 233 U. S., 97; *Louisville & Nashville R. R. Co. vs. Maxwell*, 237 U. S., 94.) In the *Hooker case* it was held that a provision in the tariff of a railroad company limiting baggage liability to $100 was binding upon a passenger who had no knowledge thereof and had not assented thereto.

The Circuit Court of Appeals attempted to distinguish these cases, particularly the *Hooker case*, on the ground that under the Interstate Commerce Act, telegraph and cable companies were not required, as are common carriers by railroad, to file their tariffs with the Interstate Commerce

Commission. This distinction is, we submit, unsound. It is true that Section 6 of the Act, which relates to the filing of tariffs, was not amended by the Act of 1910 so as to embrace telegraph and cable companies. That Section, however, relates merely to procedure. The fundamental requirements of the Act are that all charges shall be just and reasonable, and that no discrimination shall be practiced. These provisions are contained in Sections 1 and 3 of the Act. These Sections were amended by the Act of 1910 so as to apply to telegraph and cable companies. The line of decisions cited above was based entirely upon the necessity of maintaining the integrity of these two Sections so that "the purpose of the Act to have but one rate, open to all alike and from which there could be no departure," (*Boston & Maine R. R. vs. Hooker, supra*, p. 112), might be accomplished. The fact that the Act does not require telegraph or cable companies to file their tariffs with the Commission does not make the rates initiated by them any less lawful or binding than those filed with the Commission by common carriers by railroad. The Act has merely provided different methods for the establishment of rates by transportation companies and by telegraph and cable companies. The rates of both are subject to the same requirements of reasonableness and equality; neither can be departed from directly or indirectly; and discrimination must be prevented in either case, else the purpose of the Act will be subverted.

The penalties provided in the first paragraph of Section 10 of the Act apply equally to both classes of carriers for acts of discrimination. As was said by Judge Cardozo, of the New York Court of Appeals, in the recent case of *Postal Telegraph Co. vs. Associated Press*, 127 N. E. p. 256.

> "A tariff may be an established one for telegraph companies as for railroads; its marks may be less definite and obvious; to identify it may be harder; nonetheless, while it exists, there is a like duty to adhere to it within the limits of equality and justice. I think there is evidence justifying a finding that the plaintiff established a new tariff in September, 1915, as effectually as if it had put the changes in writing and filed them in a public office."

Inasmuch as petitioner followed the method provided by the Act in establishing its tariffs, rules and regulations, these tariffs, rules and regulations must, to paraphrase the language of Mr. Justice Lamar in the case of *Pennsylvania Railroad Co. vs. International Coal Co.*, 237 U. S. 197, "be treated as though it had been a statute binding as such upon the telegraph company and its customers alike."

In the case of *Postal Telegraph Cable Co. vs. Warren Godwin Lumber Co.*, 251 U. S., 27, Mr. Chief Justice White said:

> "As it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates, which it was manifestly the dominant purpose of the Act to regulate commerce to establish, a purpose which would be wholly destroyed, if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws."

We submit that the decision of the Circuit Court of Appeals absolutely destroys the equality and uniformity of telegraph and cable rates. If that decision be correct, the

conditions governing the transmission of messages are not to depend upon the tariff regulations, but upon mere accident. If the message be written on a regular blank of the company, recovery is limited to the price of the message; if written upon blank paper, or if telephoned to the company, recovery can be had for an unlimited amount; though in each case the same service is rendered and the same rate charged.

Your petitioner, by way of summary shows that the United States Circuit Court of Appeal for the Fifth Circuit erred in its opinion and decision as follows:

(a) The court erred in holding that respondent was not bound by the limitation of recovery contained in petitioner's tariff, rules, and regulations to the amount received by it for the transmission of the message.

(b) The Court erred in holding that the tariffs, rules and regulations of telegraph and cable companies adopted in pursuance of the Interstate Commerce Act are not to be given the same binding force and effect as the tariffs, rules and regulations of common carriers by railroad, regardless of whether or not the customer of the telegraph or cable company has specifically assented thereto.

(c) The effect of the Courts decision is to hold that although the message was delivered to defendant as an unrepeated message, and was received by the defendant and transmitted as such and subject to the conditions fixed for such classification, the Court arbitrarily set aside such classification, and without authority, established a classification applying to this message unknown to the Telegraph Company, all contrary to the provisions of the Interstate Commerce Act.

(d) The Court erred in affirming the judgment appealed from.

FOURTH. Your petitioner shows that this petition should be granted for the reason that the decision of the United States Circuit Court of Appeals is contrary to the provisions of the Interstate Commerce Act as interpreted by the decisions of this Court; that the effect of that decision is to destroy the purpose of that Act insofar as it relates to telegraph and cable companies, inasmuch as it opens wide the door to fraud and discrimination; that the precise question involved in this case has not heretofore been determined by any federal Court, and that if this decision is allowed to stand, it will serve to confuse the federal and state Courts in relation to the Interstate Commerce Act as applicable to telegraph and cable companies; that a great proportion of the messages transmitted by petitioner and by other telegraph and cable companies are transmitted without being originally written on the blank forms of said company, and that innumerable cases will, therefore, be presented to the Court involving the same principles of law applicable to this case, and that it is, therefore, most desirable as a matter of public policy that this question should be decided by this Court, so that there should be no uncertainty as to the law nor conflicting decisions in regard thereto.

FIFTH. Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the District Court and of the Circuit Court of Appeals depended entirely on diverse citizenship. The Circuit Court of Appeals stayed its mandate until this petition could be presented and passed upon by this Honorable Court.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

In conclusion, we earnestly urge the Court to take notice of the great importance, not only to telegraph companies, but to the business public who use the telegraph, of having an authoritative determination of this great question ONE WAY OR THE OTHER. Unless and until this Court speaks, inferior Courts, both State and Federal, are more likely to follow the conclusion reached by the Circuit Court of Appeals, and to hold that the telegraph company is liable or not in these cases accordingly as the message is not or is written on one of the usual blanks. While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the Act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office. This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank.

If the Circuit Court of Appeals is wrong, the telegraph companies should not be subjected to the multitude of suits which will doubtless be brought in reliance on

this opinion, as soon as that opinion is generally known. If the Circuit Court of Appeals is right, the telegraph companies should know it at once, in order that they may readjust their business to the changed conditions, and protect themselves in the only way in which protection is possible—by insisting on a strict observance of the rule that messages must be written on the regular blanks.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require this case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and to send to this Honorable Court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled "*Western Union Telegraph Company*, plaintiff in error, *vs. Esteve Brothers & Company*, defendant in error," No. 3,506, as identified by the transcript of the record, and to cease and withhold any further action or order in said case until the further order of this Court, to the end that said case may be reviewed and determined by this Court as provided in paragraph 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891; and that your petitioner may have such other and further

relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act; and that said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

WESTERN UNION TELEGRAPH COMPANY,

By

RUSH TAGGART,

W. B. SPENCER,

FRANCIS RAYMOND STARK

Attorneys for Petitioner.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Esmond Phelps, being duly sworn, says that he is one of the counsel for Western Union Telegraph Company, petitioner herein; that he has prepared the foregoing petition, and that all the allegations therein contained are true as he verily believes.

Esmond Phelps

Sworn to and subscribed before
me this 4 day of Aug 1920.

Pierre D. Olivier

Notary Public.

I, Rush Taggart, attorney and counsellor at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for a writ of *certiorari;* that same is not made for the purpose of delay; and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

Rush Taggart

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

No......

IN THE

Supreme Court of the United States

TERM .....

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

May It Please the Court:

Respondent, a partnership composed of residents of Spain and a resident of Savannah, Georgia, instituted suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against petitioner, a corporation organized under the laws of the State of New York, to recover the sum

of Thirty-one Thousand, Seven Hundred Twenty-five Dollars ($31,725), as damages sustained by it by reason of an error in the transmission of a cablegram from Barcelona, Spain, to New Orleans, Louisiana. On proper petition and bond, petitioner removed its case from the State Court to the United States District Court for the Eastern District of Louisiana, on February 28, 1918. The petition for removal was based entirely on the ground of diversity of citizenship (Tr. p. 8). Thereafter, petitioner filed an answer, in which it "*inter alia*" specially averred that its liability was restricted to the proportion of the tolls paid by respondent for the transmission of the message sued on which accrued to petitioner, or the sum of Four and 65/100 dollars ($4.65), for the reason that said message was an unrepeated message, and that under the rules, regulations and tariffs filed by it with the Interstate Commerce Commission under the Act of Congress of June 18, 1910, its liability for errors in unrepeated messages was restricted to the price received by it for transmitting such messages (Tr. pp. 16 to 18). The case was tried before a jury upon an agreed statement of facts. The motion of respondent for the direction of a verdict for the full amount of the loss shown by said statement of fact, to-wit, the sum of Thirty-one Thousand and Ninety-Five dollars was granted by the Court, and the motion of petitioner to direct a verdict for Four and 65-100 dollars, the proportion of the amount received by it for the transmission of the message, was denied. Petitioner's motion was based upon the following grounds:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the

> Interstate Commerce Commission, to-wit: The amount of the proportion of the tolls accruing to the defendant, or the sum of four and 65/100 dollars, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the Act of Congress approved June 18, 1910." (Tr. p. 23.)

Exceptions were duly taken to the granting of respondent's request for a direction of a verdict and the refusal of petitioner's request, and the jury then brought in a verdict for Thirty-one Thousand and Ninety-five dollars ($31,095), (Tr. p. 40), and judgment was rendered on February 12, 1920, for that amount, (Tr. p. 41). From this judgment petitioner prosecuted a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit, and the said Court of Appeals on May 26, 1920, affirmed the judgment of the District Court.

The material facts, as shown by the agreed statement of facts, (Tr. pp. 11 to 19), are as follows:

On September 13, 1917, respondent deposited in the office of the Telegraph Administration of the Spanish Government, at Barcelona, Spain, a cablegram addressed to its branch at New Orleans, Louisiana, directing the sale of two hundred (200) bales of cotton futures. The message was correctly transmitted from Barcelona, Spain, to Paris, France, where it was delivered to the telegraph lines of the French Government, which in turn transmitted it correctly and delivered it to petitioner's cable system at Havre, France, over which it was transmitted correctly to New York City, where it was turned over to petitioner's land line

system for the transmission between New York City and New Orleans. In the course of transmission between New York and New Orleans the word "hundred" was changed to "thousand," and respondents New Orleans office accordingly sold two thousand bales of cotton futures. Immediately upon discovery of the mistake, respondent closed out the transaction at a loss of Thirty-one Thousand and Ninety-five dollars ($31,095), due directly to the error in transmission.

In the month of May, 1916, petitioner, acting under authority of its executive committee, filed with the Interstate Commerce Commission its classifications of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and all of said documents have been ever since on file with the Interstate Commerce Commission. Said form of cable message contains the following provisions, (Tr. p. 36):

> 'All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a cable message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-quarter of the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message, and paid for as such. It is agreed between the sender of the following message and this company that this company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this company."

Said form of land message contained the following provisions, (Tr. p. 31):

> "All telegrams taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram, and paid for as such. In consideration whereof it is agreed between the sender and the telegraph company as follows:
>
> "1. The company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated telegram beyond the amount received for sending the same."

No request was made by respondent for the repetition of said message. The amount paid by respondent for the transmission of said message was the amount specified in the tariff then on file with the Interstate Commerce Commission for the transmission without repetition of a message containing the number of words contained in the message sued on from Barcelona, Spain, to New Orleans, Louisiana. This rate was not a joint rate, but the sum of the local rates of each of the three connecting systems over which the message passed. Had respondent requested the repetition of said message, it would have been required to pay an additional amount. None of petitioner's aforesaid forms or blanks were used at the time in the receiving or transmission of said message.

After the rendition of the judgment in the District Court petitioner presented its bill of exception, which was duly settled and allowed, and its petition for a writ of error,

and obtained an order granting a writ of error on furnishing bond for Forty Thousand Dollars ($40,000). In connection with its petition for a writ of error, defendant filed the following assignments of error:

> (1) "That the Court erred in overruling the objection of the defendant as to the admissibility of the facts stated in paragraph 7 of the stipulation of facts relative to the damages sustained by plaintiff, for the reason that said facts were irrelevant and immaterial inasmuch as the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case, beyond said amount contravenes Article 1, Section 8, Sub-division 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign countries, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910.
>
> (2) "The Court erred in granting the motion to return a verdict in favor of plaintiff in this cause for $31,095.00 for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and

forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and, therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910.

(3) "The Court erred in overruling the motion of the defendant that the Court direct a verdict in favor of plaintiff in the sum of $4.65 with interest at the rate of five per cent (5%) from September 13, 1917, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations ,and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question, provided that in case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and the Acts of Congress passed in pursuance thereof, especially the Act of Congress approved June 18, 1910."

ARGUMENT

Point One.

AS THE MESSAGE IN SUIT WAS AN UNREPEATED MESSAGE, THE LIABILITY OF PETITIONER WAS LIMITED TO THE PORTION OF THE TOLLS ACCRUING TO IT, OR THE SUM OF FOUR & 65/100 ($4.65) DOLLARS.

Until the passage by Congress of the Act of June 18, 1910, telegraph and cable companies were not subject to the Interstate Commerce Act. By the amendment of 1910, telegraph and cable companies were declared to be common carriers within the meaning and purpose, and subject to the provisions of the Act, and special provision was made for the classification of their messages.

We quote the following from paragraphs one and three of Section 1 of the Interstate Commerce Act, as thus amended. (U. S. Compiled Statutes, Ann. Vol. 8, Sec. 8563.);

> "The provisions of this Act shall apply to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered, and held to be common carriers within the meaning and purpose of this Act; provided, however, that the provisions of this Act shall not apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country, from or to any state or territory, as aforesaid.

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or for the transmission of messages by telephone, telegraph, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful; provided that messages by telegraph, telephone or cable subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, govment, and such other classes as are just and reasononable, and different rates may be charged for the different classes of messages."

The effect to be given the amendment of 1910 was clearly and forcibly stated by Mr. Chief Justice White in the recent decision of *Postal Telegraph Cable Company vs. Warren Goodwin Lumber Company*, 251 U. S. 27. That case not only upheld the validity of the unrepeated message stipulation, but also decided that the Act of 1910 excluded state regulation of interstate telegrams; and, hence, that state Courts must recognize and uphold this stipulation as to interstate messages, even though the state law declared such a stipulation void. The Court said: (p. 30).

> "In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates, which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce

business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the *Primrose Case*, the right to contract on such subject was embraced within the grant of the primary rate making power.

In the third place, as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be classified into day, night, repeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages, it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission, (*Clay County Produce Co. vs. Western Union Telegraph Company*, 44 I. C. C. 670) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

We would also quote the following language from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Gardner vs. Western Union Telegraph Company*, 231 Fed. 409, which was cited with approval in the *Warren Godwin case*.

> "It appears beyond question therefrom that in so far as the provisions of the Act to regulate commerce are applicable, it applies to all interstate telegraph business; that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purpose of the Act; that, as to their interstate business, telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just, and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

In view of the language of the Act of 1910, and of its interpretation by the Supreme Court of the United States and by the Circuit Court of Appeals for the Eighth Circuit in the cases above cited, it is manifest that the principles enunciated in the many decisions of the Supreme Court as to the effect of the provisions in the tariffs of common car-

riers by railroad are equally applicable to telegraph and cable companies. Those decisions conclusively establish the following propositions:

FIRST: That the public are bound by the rates provided by the tariffs on file with the Interstate Commerce Commission, regardless of knowledge, assent, or even misrepresentation. (*Gulf, Col. & Sante Fe Railway vs. Hefley*, 158 U. S. 98; *Texas & Pacific Railway Company vs. Mugg*, 202 U. S. 242; *Louisville & Nashville R. R. Co. vs. Maxwell*, 237 U. S. 94, and cases cited therein.)

SECOND: That a limitation of liability contained in or filed with the tariffs is an essential part of the rate, and that a shipper or passenger is bound thereby, even though he has no knowledge thereof, and has not assented thereto. (*Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, and cases cited therein.)

The situation presented in the *Hooker case* was substantially the same as that presented in the case at bar. In that case, plaintiff had checked her baggage on a first-class railroad ticket purchased by her; no inquiry was made of her as to its value, nor did she assent to any limitation of liability, nor have any knowledge of any tariff provisions on that subject. However, the tariffs on file with the Interstate Commerce Commission contained a provision limiting baggage liability to $100 in the absence of a greater declared value. Upon these facts the Court held that the recovery for the loss of the baggage due to the negligence of the carrier was limited to $100. The Court said (p. 110):

> "The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for

the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the Court did not stop there: In *Adams Express Co. vs. Croninger, supra,* p. 509, it said: "The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." In *Kansas City Southern Ry. Co. vs. Carl, supra,* p. 652, this Court said: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actualiy posted in the station. *Texas & Pacific Railway cs. Mugg,* 202 U. S., 242; *Chicago & Alton Ry. vs. Kirby,* 225 U. S. 155. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay . . . . . (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate." And in *Mo. K. & T. R. R. Co. vs. Harriman, supra,* this Court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules (p. 669), "not only because referred to in the contract signed by them, but because they had been lawfully filed and published..... (p. 671). When the carrier graduates

> its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate." In *Chicago, R. I. & P. Ry. Co., vs. Cramer*, 232 U. S., 490, this Court said, p. 493: "That rule of liability (the uniform rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

We submit that the decision in the *Hooker case* is determinative of the question here presented. The *ratio decidendi* of that case, and of the many other cases upholding the validity of the rates and the limitations of liability prescribed in the tariffs on file with the Interstate Commerce Commission, was the recognition of the necessity of making effective the purpose of the Interstate Commerce Commission Act "to have but one rate open to all alike, and from which there could be no departure." (*Boston & Maine Rd. vs. Hooker, supra*, p. 112.) The decisions were bottomed upon broad grounds of public policy and without regard to the equity of the claim of the particular litigant. The same reasons of public policy that were the basis of those decisions necessitate the enforcement of the tariff limitation in the case at bar.

> "Almost from the beginning of telegraphy in this country, the basic rate has been that charged for the transmission of an unrepeated message, the rates

for repeated, and special value messages being built upon it. The unrepeated rate of charge has always been made upon the condition stated in the contract between the sender and the company, that no liability should attach to the company for errors in the transmission, or delays in the delivery beyond the sum received for sending the message."

(*Clay County Produce Co. vs. Western Union Telegraph Company*, 44 I. C. C., 670).

More than a quarter of a century ago, the Supreme Court of the United States recognized the validity of the unrepeated message stipulation, (*Primrose vs. Western Union*, 154 U. S., 1); and in 1910 Congress placed its seal of approval on that decision by providing that messages might be classified into "repeated, unrepeated, and such other classes as are just and reasonable." Furthermore, Congress recognized that the limitation of liability was an integral part of the rate by providing that different rates may be charged for the different classes of messages.

It is clear, therefore, that the limitation of liability to the price of the message is the prime factor in fixing rates for unrepeated messages, that uniformity in rates can only be maintained by enforcing this stipulation in every case where no request has been made for a repetition of the message at the advanced rates, and that to make the enforcement of this condition depend entirely upon whether the message was written on the blank form of the company would open the door wide to fraud and discrimination, would violate the fundamental principle that all persons be charged the same rate for the same service, and would destroy the effectiveness and uniformity of the Act.

Opposing counsel assert that the *Hooker* and other decisions cited ante are not applicable because the de-

fendant company was not compelled under the law to file any tariffs with the Interstate Commission. We submit that this is a distinction without a difference. The question of whether or not the defendant was compelled to file its tariffs is rendered immaterial by the fact that it had done so long prior to the sending of the message sued on. Those rates, and the conditions that were a part of those rates, became binding upon the public and the company alike, upon their adoption by the company in conformity to the authority vested in it by the Act, and could not be departed from until changed either by the fixing of new rates, or by the order of the Commission. Not only has the Commission not seen fit to disturb the unrepeated message stipulation, but it had, four (4) months before the sending of the message in suit, held that it had jurisdiction to consider the reasonableness of that stipulation, and had held the stipulation valid. (*Clay County Products Co. vs. Western Union Telegraph Co.*, 44 I. C. C., 670).

In the course of its opinion, the Commission said, (p. 674):

> "Under the Act, as has many times been said, the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges. But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The Courts have often said that the vital feature of the Act to

regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of the common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in common right as well as in common justice, runs all through the supplementary legislation enacted in aid of the enforcement of the Act. It can not, therefore, be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, their rates and charges are nevertheless binding upon such companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the Act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service. To secure such uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the Act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies, unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference."

The Interstate Commerce Act outlined certain steps that must be taken by the various carriers before a rate becomes legal. In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate or regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed. In the case of the other carriers subject to the same act, namely, telegraph companies, the act does not require the filing of the rate or the regulation, but expressly states that the act or regulation is legal and binding once it is fixed and established by the carrier. Again, as pointed out in the *Cultra* opinion, the carrier initiates the rate and the regulation, and once a rate or regulation is so initiated it is, and remains, the legal rate or regulation until it is changed by the act of the carrier itself or by the Interstate Commerce Commission. Therefore, while the method of establishing a legal telegraph rate under the Act of Congress in question differs from that imposed upon carriers of persons and property, the object in the case of all carriers is the same, namely, the attainment of equality of rate, regulation and service, and the prevention of discrimination.

It is not the filing of the rate in the case of carriers of persons and property that creates constructive notice of the regulations under which these carriers are doing business, but it is the establishment of a legal rate or regulation that results in constructive notice on the part of the public. That the mere filing of a rate or regulation is what constitutes constructive notice is a misconception; the Congress had no such intention in mind. What was sought was uniformity. There would be no uniformity of service

if the legal rate or regulation could be deviated from by accident or design. The test, therefore, which should be applied is not, as we have indicated above, whether a rate or regulation is on file with a regulatory body, but rather whether the rate charged and the regulation which attaches to and is a part of the rate, is the legal rate, and if it is the legal rate, what service is to be performed therefor. As we have pointed out, in the case of carriers of persons and property, a rate is not legal until it is filed and, therefore, unless the rate involved has been filed, a carrier cannot in an action at law invoke the doctrine of constructive notice, not because of the physical fact that it has failed to file the rate, but because having failed to file it, it is not a legal rate. Therefore, the question of filing does not enter into the determination of the question whether the telegraphic rate charged is, or is not, the legal rate; the test in the case of a telegram is, Was the rate charged the one initiated by the telegraph company prior to the date of the message involved and was it, therefore, the regular established rate? If it was, then it is the legal rate, and if it is the legal rate, the doctrine of constructive notice must apply just as forcibly and just as effectively as the doctrine applies in the case of carriers of persons and property who have established a similar legal rate. The principal object in filing the defendant's rates and schedules with the Interstate Commerce Commission was to make it easy to show what the legal rate and regulation was on the particular date; it was not because defendant was under any misconception as to the necessity of filing rates or regulations, or as to the effect of such filing on the question of whether a rate or regulation was legal.

In other words, the fact that the Interstate Commerce Commission has not seen fit, under Section 6 of the Interstate Commerce Law, to require this defendant to file its tariffs and regulations, is immaterial in view of the fact that the Commission, under its powers, granted by Congress, over interstate carriers including the defendant, has assumed and exercised the right of regulation and supervision of the tariffs and regulations filed by defendant, and has recognized such tariffs and regulations as the legally established ones. It has expressly recognized those tariffs and regulations as binding upon all until changed; that binding force resting not upon any acceptance of such terms by the shipper when he contracts with the carrier, but upon the reason of public policy which as a matter of law imports knowledge and acceptance of such terms to every shipper, no matter how he deal with the carrier. Such being the case, and those tariffs and regulations having been repeatedly upheld as to the general public, they can not without violation of the provisions against preference and discrimination, be invalidated as to a particular class of users of the defendant's facilities for interstate commerce.

The question of the defendant filing its tariffs with the Interstate Commerce Commission is also immaterial when considered from a fair analysis of the provisions of the Interstate Commerce Act. It is significant that immediately after the enactment of the amendment taking effect August 10, 1910, by which telegraph, telephone and cable companis were made subject to this Act to regulate commerce, the Interstate Commerce Commission, after careful hearing of the parties interested, considered the sections of the Act which apply to such companies, and in conference ruling 305 in the latter part of the year 1910, or early in the year

1911, announced its conclusions that telegraph, telephone and cable companies must conform to the provisions of Section 1 of the Act requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just and may lawfully issue franks covering their interstate service to the same extent as other common carriers under the provision of said section; and that they were also governed by the provisions of Section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage whatsoever, and are subject to the lawful orders of the Commission pursuant to Section 15 of the Act and also to Section 20 thereof.

Let us examine for a moment the effect of these particular sections of the Act which the Commission thus concluded applied to and governed actions of telegraph companies.

By Section 1, as has been indicated above, they were designated as common carriers under and subject to such provisions of the act as were made specifically applicable to them in the transmission of messages between the states and territories and from or to foreign countries. By Section 1 they were also required, together with all common carriers named in the act, to have their service charges for such transmission just and reasonable, and every unjust and unreasonable charge was prohibited. It was also made the duty of such common carriers to enact just and reasonable regulations and practices respecting the management of their business, and they were also specifically authorized to classify into certain defined classes messages for transmission and to make different rates for the different classes of messages.

It will be observed that these provisions apply to all classes of transmission companies and necessarily govern all such transmission within the territorial limits of the United States.

By Section 3 of the act it was made unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By Section 15 there was granted to the Commission either upon its own initiative or upon complaint, power to investigate and examine, and whenever "the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property, or for the transmission of messages by telegraph or telephone, as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is

just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practices so prescribed."

Section 20 deals with reports, method of keeping accounts, and throws no light on questions involved in this case.

A careful reading of the sections of this Interstate Commerce Act will indicate that the duties of common carriers are defined in Sections 1, 2, 3 and 4; 2 and 4 having special reference to transportation carriers, do not apply to the telegraph and cable companies; 1 and 3 unquestionably do. The subsequent sections of the act relate to the methods, procedure and instrumentalities which, in the opinion of Congress, were necessary to be employed in order to secure the observance of the obligations set forth and enacted in the four sections to which we have referred. These subsequent sections provide different methods by which different classes of carriers are required to proceed in the transaction of their business in the observance of the duties of uniformity of service and equitable dealings with the public as defined in the first four sections of the act.

Thus, Section 6 requires, before carriers of goods and passengers shall embark in the business of such transportation, that their rates, fares and charges shall be filed with the Interstate Commerce Commission, and be posted at stations, and such carriers are prohibited from engaging or participating in transportation of passengers or property

unless such schedules have been thus filed with the Commission and posted; in addition, there is prohibition against the charging, demanding or collecting greater or less, or different, compensation than such as is provided in the tariff in effect at the time.

It is obvious in tracing the historic development of the act and the amendments made since the original enactment of the legislation in 1887 that the additional requirements in this Section 6 and other features closely connected therewith found in other sections of the act are applicable to this particular class of carriers, that they have been added to the act in order to secure from such carriers the due observance of the provisions of Sections 1, 2 and 3 of the act, which remain substantially as originally enacted.

The mere filing of these schedules by this particular class of carriers as provided in Section 6 has no significance or peculiar value with respect to the rates, except as they secure to the persons dealing with the carriers the equal facilities to protection against unreasonable and discriminatory charges, and that were required of the carriers before these special requirements were fixed by Congress. Carriers before such amendatory legislation were under obligations to render equal service and were required to extend to each and every customer the same rates and facilities as since these schedules have been required to be thus filed with the Interstate Commerce Commission. The mere fact that such requirements are now exacted of this particular class of carriers is an evidence not that any peculiar merit attaches or duties arise because of the filing of these schedules, but that Congress has concluded in its wisdom that in that method alone can the performance of the obligations of Sections 2 and 3 be secured. There has been no change of obligation. The obligations of the carrier remained the

same at all times, but the method of securing performance has, as we have seen, by the amendments to the act, and particularly to Section 6, been made much more rigid in this class of carriers. It is also to be noted that while such has been the case with transporters of freight and passengers, the obligation existing under Section 3 of the act and under Section 1, with respect to telegraph companies, is identically the same as that of carriers of freight and passengers. The regulation of both classes of carriers must be reasonable; their charges for service rendered must also be reasonable. Unreasonable charges are equally prohibited as to both. The quality of service exacted from both is identical, but in the case of telegraph companies Congress has concluded that it is permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publications at stations, as is also the case with respect to its regulations and classifications of messages and the rates therefor.

The procedure thus differs with these two classes of carriers, but the obligations of the carriers to the public are identically the same, and the obligations of the public to the carriers are likewise identically the same, and defined in the same language in Sections 1 and 3 of the act. This is clearly indicated by Commissioner Harlan in the Clay County Products Company case in the foregoing quotation from his opinion and also in the succeeding paragraph, where he says—following the statement with respect to the unrepeated message rate:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may

be; and the rules fixing the measure of the defendants liability under these several classes of rates are essentially a part of the rates themselves."

And still further in the course of the opinion, after discussing the proviso in the first section of the Interstate Commerce Act, authorizing the classification of messages into the different classes with the right to charge different rates, he says:

> "It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed."

The same conclusion is indicated by Chief Justice White in the case of *Postal Telegraph Cable Company vs. Warren Godwin Lumber Company* in the first paragraph of the quotation from the opinion (cited *ante*). It conclusively follows from the foregoing that, although the telegraph companies under the act have the right to initiate rates, fares and charges for the different classes of messages, and to establish reasonable regulations for their transmission

without filing the same with the Interstate Commerce Commission. yet, that such regulations have, as to the business which such companies are arranging to transact with the public, the same force and effect as regulations of carriers of freight and passengers have when filed with the Commission, in accordance with the provisions of Section 6; the difference between the two being simply that Congress in its wisdom has required the prior filing in the one case and dispensed with the necessity of such filing in the other, yet leaving each of the carriers subject to the same obligations to the public, and as Commissioner Harlan observes, the public is equally bound to observe the rules and regulations, notwithstanding the difference in the method of establishing such regulations and rates.

When the telegraph company, therefore, by its Board of Directors, duly enacted the regulations as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, which it had made, the rules for binding the public were such rules thus enacted until changed by such company or by order of the Commission; and it made no difference whether they were known to the public or not, each class of messages took the rate attaching to that class of messages and the difference in the liability as fixed by the regulations. Such is the effect of the decision of the Supreme Court in all the cases which have been before the Court respecting carriers of freight and passengers, and the fundamental principle which underlies these decisions under Section 3 of the Interstate Commerce Act which requires uniformity, applies just as completely in the case of transmission of messages as in the case of transportation of persons or property. In other words, the rates and the regulations which were fixed by the telegraph company constitute the methods by which alone it deals with

the public and the public deals with it until they are lawfully changed. There can be no special transaction outside of those rules and regulations as to either class of carriers.

The argument as to identity of obligation of carriers of property and persons and of transmission companies is strengthened by the provisions of the Esch Railroad Bill lately passed, which, in Section 404, amends Section 2 of the Interstate Commerce Act and makes that section apply to "transmission" as well as "transportation."

The *Hooker case*, the *Mugg case* and the other transportation cases (cited *ante*) are therefore directly in point upon this proposition, and such is the clear indication in the opinion of Commissioner Harlan in the *Clay County Products case*, and in the decision and opinion of Chief Justice White in the *Warren-Godwin Lumber Company case*.

If this were not so, a customer of a telegraph company may, by delivering his message to the telegraph company on a blank piece of paper, and claiming that he had no knowledge of the regulations, make the validity of the Commerce Act, and the regulations of the telegraph company lawfully established in accordance with its provisions, and their application to him, dependent upon his knowledge and his consent. Such was clearly not the intention of Congress. It would also open up the way to the grossest inequality of service, and such was also not the intention of the act. The construction of the act contended for makes the act effective both as to the telegraph companies and as to transportation cmpanies to the same degree and the same extent as it was evidently the intention of Congress that it should be.

The decision of the Supreme Court of Kansas in the case of *Shawnee Milling Co. vs. Postal Telegraph Cable Co.*, 166 Pac. 493, is squarely in point, as shown by the syllabus, which reads:

> "Where a telegraph message is dictated over a telephone and is thus received by a telegraph company for transmission, it will not be presumed that any preferential or discriminatory service in violation of law is intended, and the message will be considered as if it were written on the ordinary blank forms furnished by the telegraph company, and the company's liability for an error in transmission is neither greater nor less nor different than if the message were delivered in the usual and more formal mode of sending telegrams."

The plaintiff had judgment in that case because the message was intrastate, and it was held that the Federal law did not apply, and limitations contained in the defendant's standard message blanks were, under the local law, unreasonable. It also appeared that the defendant had not filed its schedule of rates and charges with the Public Utilities Commission, as required by law. But as to the questions involved herein, the sole distinction as to facts was that the Kansas statute affirmatively required the defendant's rates to be filed, while the Interstate Commerce Act does not impose such affirmative requirement on defendant herein, but makes its lawfully established rates binding on it, its customers, and the public until changed.

The Court in that case said:

> "It will thus be seen that the telegraph company has two principal schedules of rates—one for unrepeated messages, in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate fifty per cent. higher for repeated messages in which its liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These

rates must be filed with the Public Utilities Commission and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service is forbidden by the public utilities act. (Gen. Stat. 1915, ch. 97; Laws of 1911, ch. 238, Secs. 3, 10, 11, 12, 20, 30.) The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was being extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by Section 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way, with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the Public Utilities Commission and subject to its approval; and such rates and service are invalid until they are so filed; and when formally promulgated, they may not be departed from with impunity. (Gen. Stat. 1915, Secs. 8398, 8400, 8416; *The State ex. rel., vs. Postal Telegraph Co.*, 96 Kan., 298; 150 Pac., 544; *Mollohan vs. Railway Co.*, 97 Kan., 51; 154 Pac., 248.)

"The Court is of opinion that in the absence of

a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attached to the usual and more formal mode of transacting its corporate business."

It is also said, and this was the basis of the ruling of the District Court below, that as the contract for transmission was made in a foreign country, the tariff provisions can have no bearing. The jurisdiction of the Commission over foreign messages is not denied; but it is claimed that the *"lex loci contractus"* governs, and that, as there was no limitation of liability under the foreign law, no such limitation will be enforced here.

It is true that the rights and obligations of the parties under a contract of carriage to be performed in several different states or countries will ordinarily be determined by *"lex loci contractus."* (*Liverpool Steam Co. vs. Phenix Ins. Co.*, 129 U. S., 397); but this general principle is subject to the exception that the contract will not be interpreted or enforced in accordance with the foreign law, when to do so would be to violate the public policy of the *"lex fori;"* and this is particularly true where, as in this case, the wrong complained of occurred in the jurisdiction in which the suit is brought (Corpus Juris on Contracts, Vol. 13, p. 257).

In the *Kensington case*, 183 U. S., 263, this Court refused to recognize a provision of a contract of carriage exempting the carrier from liability for negligence, though such provision was valid under the law of the place where the contract was made. The Court said (p. 269):

"As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising here-

under are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the Courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by will of contracting parties can the public policy of a country be set at naught. (Story, Conflict of Laws, paragraphs 38, 244.) Whilst as said in *Knott vs. Botany Mills*, the previous decisions of this Court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this Court. In *Liverpool & Great Western Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public

policy applied by the Courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the states of the Union. Nor is the suggestion valid that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate cause upon which it may depend, is the criterion."

It is manifest that an agreement made in a foreign country by defendant to send cablegrams to various points in the United States at less than its tariff rates would be invalid and unenforceable in this country. So, too, an agreement made in a foreign country by defendant to repeat all telegrams in the United States and only to charge the rates provided for unrepeated messages would be illegal and unenforceable by our Courts. Yet this would be merely doing directly what plaintiff now seeks to accomplish by indirection, viz: to pay the lower rate provided for an unrepeated message and to escape the limitation of recovery to the price of the message, which is the basic factor in fixing that rate.

We submit that public policy requires that the tariff provision shall be enforced, whether the contract is entered into in this country, or in a foreign country. A contrary rule would open the door wide to evasion of the Interstate

Commerce Act, and would result in discrimination in rates in favor of foreigners and against our own citizens. It is inconceivable to us that such a result should be permitted by the Courts of this country; especially when as here, the breach of contract occurred within the territorial limits of the United States and there was a separate rate fixed for performance of that portion of the contract which was to be executed in this country.

The error which is the basis of the cause of action in this case occurred in the course of transmission between New York and New Orleans; the rate paid by plaintiff was a "Combination" rate, one component part of which was the rate from New York to New Orleans. Plaintiffs were not entitled to any greater service nor should defendant be subjected to any greater liability in the transmission of this message from New York to New Orleans than if it had been an ordinary unrepeated message, originating in New York. Could there be any question that in such a case the Court would follow the decision in the *Hooker case* and enforce the tariff limitation of liability?

In *Commercial Cable Co. vs. Western Union Telegraph Co.*, 41 I. C. C., 32, the Commission said (p. 38):

> "The defendant contends that the rates on messages from foreign countries to points in the United States are through rates; that this Commission has no jurisdiction over such through rates; that the defendant has no 'rates' on deferred messages from New York to points in the United States, the earnings received by the defendant on such messages being simply portions of the through charges accruing as divisions to the defendant for its part of the through services.

"Apparently the rates on messages from points in foreign countries to points in the United States are not 'joint through rates' such as those published by a railroad which holds the concurrence of its connections. The through rates, however, are made by adding together the rates or half rates of the several telegraph and cable companies which participate in the transmission, and thus the complete charge for the through service can readily be ascertained and quoted to the sender at point of origin. As previously stated, the through charge on a deferred message from an interior point in France to an interior point in this country would consist of three component parts, the French Government receiving one-half its local rate to Havre, the cable company receiving half its regular cable rate, and the land line in the United States receiving half its rate on regular cable message. It is clear, therefore, that the through rate is a 'combination' rate, one component part of which is the charge made by the land line for transmitting the message from New York to destination.

"It may be observed that the transmission of a through message is not a continuous service. The message must be transferred from a land line to a cable line on the European shores, and again transferred from a cable line to a land line at New York; and the defendant concedes that 'so far as defendant is concerned,' the messages may be regarded as originating in New York. Looking at the matter from this point of view it is clear that we have authority under the act to require the defendant, in imposing charges for its service within this country, to avoid unjust discrimination, not only as between persons, but as between carriers. In *Mattingly vs. Pennsylvania Co.*, 3 I. C. C., 592, at page 609, the Commission said:

> "'It (a common carrier subject to the act) cannot engage in the service and reject the obligations imposed for the regulation of the service. One of these obligations founded on the public interests is impartially in receiving, shipping, forwarding and delivering interstate traffic. There can be no preferential service in this respect as regards persons, carriers or traffic, and no refusal to do for some what is done for others, nor any unjust discrimination in charges.'"

The real question in this case is whether the telegraph Company, having adopted rules and regulations in accordance with the express requirement of the act, and having also in pursuance of the express provisions of Section 1 of the act, classified its messages and fixed different rates for such classifications, such regulations and rates control it and the public dealing with it in respect to the receipt and transmission of messages.

The claim of the telegraph company is that when such regulations have been thus adopted by it in accordance with the statute, as in this case, and have not been changed by the telegraph company, or by order of the Interstate Commerce Commission, whether they are known to the public dealing with it or not, they bind the public and it with respect to the rights and obligations of each in respect to such messages.

Unquestionably the position of the court below and of the plaintiffs in this case is that for some reason applicable to telegraph companies as distinguished from carriers of freight and passengers, such regulations are not thus binding. The Court in charging the jury in this case used this language:

> "The message was originally sent from Barcelona, in Spain, and the form stipulated in the tariffs on file with the Interstate Commerce Commission was not used, and my ruling is that the sender was not bound by these forms and tariffs on file with the Interstate Commerce Commission in the United States, that therefore the plaintiff can recover his actual damages, the case arising out of the mis-sending of a cable regarding the sale of cotton futures."

As we have had occasion to observe, the act while requiring the telegraph company to adopt and put in force reasonable regulations, does nowhere require that they shall depend for their validity upon being brought home to the knowledge of its customers tendering messages for transmission. Was it the intent of Congress that such regulations should depend for their validity upon being brought to the attention of the public and being assented to by the public by its adoption of them? No such intention is expressed in the act. Was it the intent of Congress that as to such persons as did not receive such information from the telegraph company, that such regulations should have no force or effect? That would be to impute to Congress the intent that the telegraph company might, by failing to make due publication in effect defeat the plain command of the act expressed in Section 3 that it should render equal service to all. Was it the intent of Congress that messages only tendered by the public written upon forms which were fixed in tariffs and carrying some or all of the regulations should be subject to the provisions of the Interstate Commerce act? If any of these things had been intended, would not Congress have expressed some indication of such requirement and distinction in regard to the application of the regulations and rates. There is nothing of that sort in the act

and inasmuch as the act was designed to secure equality of service (*Postal Telegraph Cable Company vs. Warren-Godwin Lumber Company*, cited *ante*), it is the fair conclusion that all that was required was the adoption of such regulations and the obedience to them and carrying them out in the performance of the business, and that the public was bound to take notice that such regulations had been made, and was bound by such regulations.

Is not this the fair implication arising from the historical development of the act? Originally the sole remedy sought by the enactment of the Interstate Commerce act was the elimination of inequalities and irregularities believed to obtain in the transportation of persons and property. From 1887, the enactment of the original act, until 1910, the act was concerned with the solution of that class of problems. In 1910, at the time of the passage of the amendment, the act of 1887 had been construed, added to by acts, supplemental and amendatory, until there might be said to be a complete system of regulations and laws attaching to carriers of freight and passengers. In that state of the law Congress concluded to amend and to bring telegraph companies under the provisions of the act. They made telegraph companies subject to the provisions of Section 1 and Section 3, which related to the fundamental obligations of carriers, including telegraph companies, respecting their relation to the public in the transmission of messages. They did not see fit in any way to subject them to the peculiar provisions which they had discovered to be necessary in the case of the carriers of freight and passengers. But at that time the significance of such filing of rates and tariffs was fully understood by Congress. The importance and significance of regulations was equally well understood; so likewise was the significance and importance of classifications

which were well known in freight transportation, and Congress recognized it as equally important with respect to the classes of messages telegraph companies should deal with.

Knowing all these things, Congress evidently purposely refrained from requiring telegraph companies to adopt the stringent rules which had been laid down respecting filing tariffs or regulations with the Interstate Commerce Commission, or making provisions for filing them at offices of the telegraph companies, contenting itself with simply requiring that such reasonable regulations should be adopted for the public and that the rates should be adopted or initiated, as the phrase is, presuming that these would be entirely sufficient to secure for the public from the telegraph companies the equality of treatment in the transaction of the telegraph business which at that time obtained and has obtained until now, with respect to carriers of freight and passengers. This being so, we think that the language employed in the last case upon the subject respecting carriers of freight and passengers, *Louisville & Nashville Railroad Company against Maxwell*, (cited *ante*), has perfect application to the situation in this case.

Justice Hughes, speaking for the Court, says:

> "The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. *Gulf, Col. & Santa Fe Ry. vs. Hefley*, 158 U. S. 98; *Tex. & Pac. Ry. vs. Mugg*, 202 U. S. 242; *Tex. & Pac. Ry. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 445; *Armour Packing Co. vs. United States*, 209 U. S., 56, 81; *N. Y. C. & H. R. R. Co. vs. United States*, 212 U. S. 500, 504; *Chicago & Alton R. R. vs. Kirby*, 225 U. S. 155, 166; *Illinois Central R. R. vs. Henderson*

Co., 226 U. S. 441; *Kansas Southern Ry. Co. vs. Carl*, 227 U. S. 639, 653; *Pennsylvania R. R. vs. International Coal Co.*, 230 U. S. 184, 197; *Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, 110-113; *George N. Pierce Co. vs. Wells, Fargo & Co.*, 236 U. S. 278, 284. In the *Muggs case, supra*, it appeared that a rate, less than the lawful scheduled rate, had been quoted to the shipper by the agent of the railroad. The shipper had relied upon the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in *Kansas Southern Ry. Co. vs. Carl, supra*: 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.' It was 'the purpose of the act to have but one rate, open to all alike and from which there could be no departure.' "

In the case of the telegraph companies there was no requirement that these regulations should be set forth and presented on the message forms, and the fact that the message form was not used, as indicated by the Court in its charge, did not render those regulations inapplicable to the plaintiff with respect to the message delivered at their in-

stance to the telegraph company at Havre, but such regulations as applied to an unrepeated cable message attached the moment that message came within the jurisdiction of the United States by virtue of the authority vested in Congress and the statute which it had enacted in pursuance of that authority, and the regulations which the telegraph company had adopted under the authority of the statute.

In conclusion, we earnestly urge the Court to take notice of the great importance, not only to telegraph companies, but to the business public who use the telegraph, of having an authoritative determination of this question **one way or the other.** Unless and until this Court speaks inferior Courts, both State and Federal, are more likely to follow the conclusion reached by the Circuit Court of Appeals, and to hold that the telegraph company is liable or not in these cases accordingly as the message is not or is written on one of the usual blanks. While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the Act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office. This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank.

If the Circuit Court of Appeals is wrong, the telegraph companies should not be subjected to the multitude of suits which will doubtless be brought in reliance on this opinion, as soon as that opinion is generally known. If the Circuit Court of Appeals is right, the telegraph companies should know it at once, in order that they may readjust their business to the changed conditions, and protect themselves in the only way in which protection is possible—by insisting on a strict observance of the rule that messages must be written on the regular blanks.

We submit that the liability of petitioner was restricted by the tariff limitations to the sum of Four Dollars and Sixty-five cents; that all of the assignments of error to the Court of Appeals were well taken; and that the writ of error should, therefore, have been maintained and the case have been remanded for a new trial; and we, therefore, pray that a writ of certiorari may be granted, and that thereafter the judgments of the District Court and of the Circuit Court of Appeals be reversed and the cause remanded for a new trial.

Respectfully submitted,

SPENCER, FENNER, GIDIERE & PHELPS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Western Union Telegraph Company, Petitioner.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 3506

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY,

Defendant in Error.

The defendant in error is hereby notified that the plaintiff in error will on Friday the 24th day of August, 1920, upon its verified petition and a copy of the entire record in this cause, file with the Clerk of the Supreme Court of the United States in his office at the Capital in the City of Washington, D. C., a motion and a petition for a writ of certiorari and brief in support thereof, copies of which are herewith delivered to you.

SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted, and delivery of a copy thereof and petition for writ of certiorari and brief in support of the petition are hereby acknowledged.

Hall, Monroe & Heman

Attorneys for Defendant in Error.

New Orleans, La. Aug. 4, 1920

SUPREME COURT OF THE UNITED STATES

TERM .....

WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

versus

ESTEVE BROTHERS & COMPANY,

Respondent.

Comes now Western Union Telegraph Company, by Rush Taggart, its undersigned counsel, and moves this Honorable Court that it shall, by certiorari or other process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth District, require said Court to certify to this Court for its review and determination, a certain cause in said Court of Appeals lately pending, wherein your petitioner, Western Union Telegraph Company, was plaintiff in error, and respondent, Esteve Brothers was defendant in error, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

RUSH TAGGART,

Counsel.

FEB 28 1921
JAMES D. MAHER
CLERK

IN THE

UNITED STATES SUPREME COURT

October Term, 1920.

No. 481.

WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

vs.

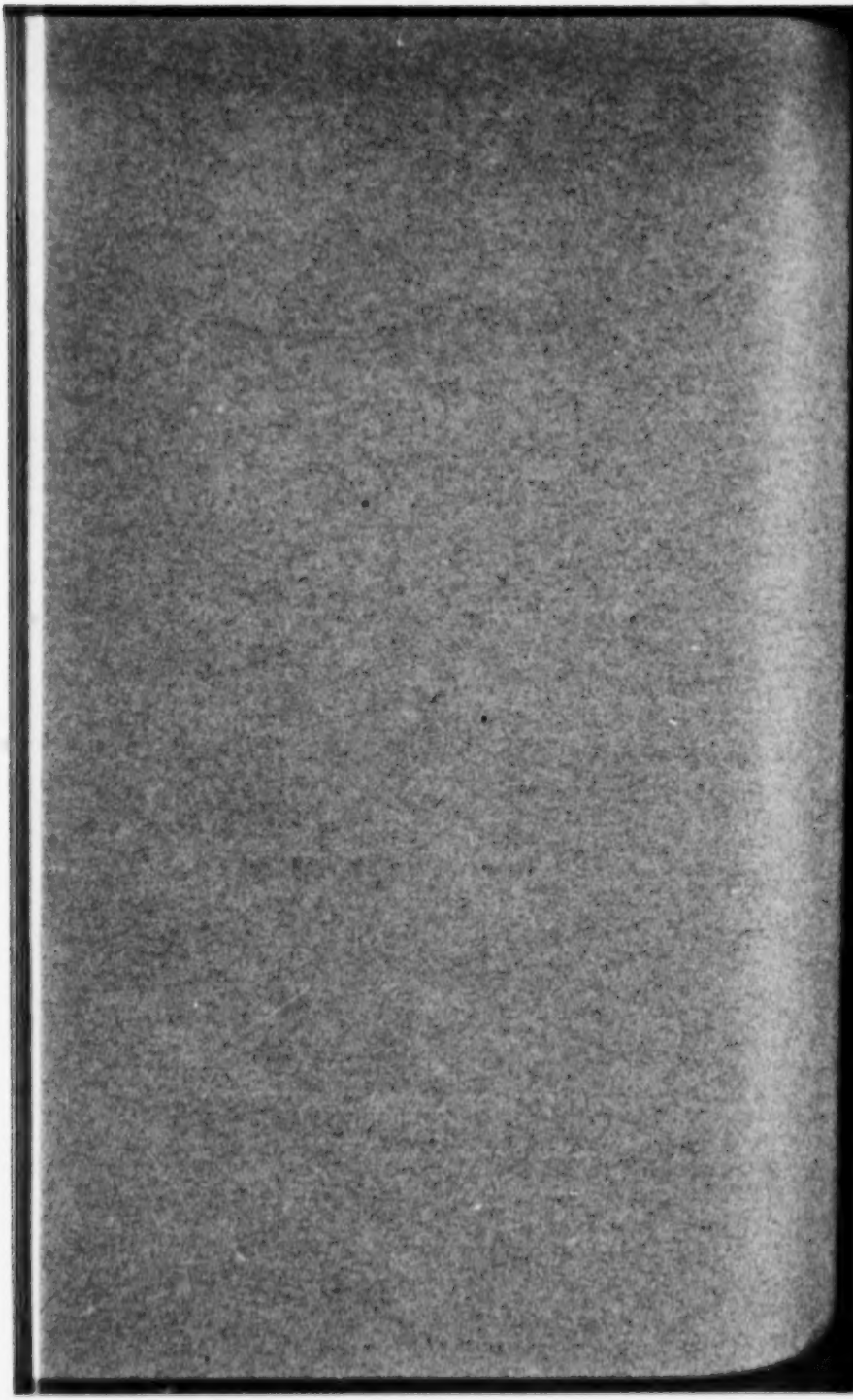
ESTEVE BROTHERS & COMPANY,

Respondents.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION BY THE PETITIONER TO ADVANCE.

RUSH TAGGART,
FRANCIS RAYMOND STARK,
JOSEPH L. EGAN,
Attorneys for Western Union Telegraph Company.



UNITED STATES SUPREME COURT

October Term, 1920.

No. 491.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

ESTEVE BROTHERS & COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Motion by the Petitioner to Advance.

Comes now the petitioner, The Western Union Telegraph Company, and respectfully moves that the above-entitled cause, in which a writ of certiorari was granted on October 18, 1920, be advanced for early hearing during the current term of this court.

The vital question involved is this: Are the stipulations limiting liability for interstate and foreign telegrams, which have been duly established by telegraph companies in pursuance of

the permission granted by the Act to Regulate Commerce, and filed with and approved by the Interstate Commerce Commission, applicable to all telegrams alike, or only to such telegrams as are written on the ordinary message blanks in which these conditions are set forth? In other words, does the sender of the message who writes it on plain paper, or telephones it to the telegraph office, secure a higher measure of liability, in exchange for the same rate, than his competitor who writes a similar message on the usual sending blank?

The foregoing question, so far as the Western Union lines are concerned, has been raised in upwards of a hundred cases brought in various courts throughout the United States; and additional actions involving the same question are continuing to be brought from day to day. This question is now pending before appellate courts in Nebraska, Texas and Mississippi, and will shortly be before appellate courts in other states. By reason of the decision of the Circuit Court of Appeals in this case, which is the only reported decision on the question, inferior courts in the various states and the district courts of the United States, may, and Federal courts in particular are very likely to, reject the petitioner's contention and refuse to apply the limitations of liability on interstate messages, where the action is based on messages delivered to the petitioner over the telephone or written on plain paper.

The only other question which was raised in this case—namely, whether the stipultaions limiting liability, which are a part of the rates for interstate telegrams and foreign cables, apply to incoming cable messages (so far as their transmission

within the United States is concerned), has, we think, just been answered by the court in petitioner's favor, being necessarily involved in the decision in *Galveston, Houston & San Antonio R. R.* v. *Woodbury et al.*, U. S. , 41 Sup. Ct. Rep. 114.

Notice of this motion has been served on opposing counsel.

RUSH TAGGART,

FRANCIS RAYMOND STARK,

JOSEPH L. EGAN,

Attorneys for Western Union Telegraph Company, Petitioner.

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Supreme Court of the United States

October Term, 1920—No. 491.

THE WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

against

ESTEVE BROS. & COMPANY,

Respondents.

BRIEF FOR PETITIONER.

General Statement.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The vital question involved is this: Are the stipulations limiting liability for interstate and foreign telegrams, which have been duly established by telegraph companies in pursuance of the permission granted by the act to regulate commerce, and filed with and approved by the Interstate Commerce Commission, applicable to all telegrams alike, or only to such telegrams as are written on the ordinary message blanks in which these conditions are set forth? In other words, does the sender of the message who writes it on a plain paper or telephones it to the telegraph office secure a higher measure of liability, in exchange for the same rate, than his competitor who writes a similar message on the usual sending blank?

The material facts, as shown by the agreed statement (R. pp. 17 and 20), are as follows:

On September 13, 1917, the respondents deposited in the central office of the Spanish government telegraph administration at Barcelona, Spain, for transmission to New Orleans, La., a message reading as follows:

> "Esteve Bros., New Orleans. Sell two hundred bales futures naming equivalent New Orleans October price (signed) Esteve."

The message was correctly transmitted by the central office of the telegraph administration at Barcelona, Spain, to Paris, France, and was correctly transmitted by the system of telegraphs owned and operated by the French government from Paris, France to Havre, France, and was there delivered to the petitioner's cable system, over which it was transmitted correctly to New York City, where it was turned over to the petitioner's land line system for transmission between New York City and New Orleans. On the petitioner's land line system between New York City and New Orleans the third word, namely the word "*hundred*" in the text of the message, was changed to read "*thousand.*"

On May 2, 1916, the executive committee of the petitioner, by formal act, had adopted and approved the classification of messages and the forms and the rules and regulations respecting the transmission of messages and the conditions and stipulations shown on its message forms, and had authorized the petitioner's president to file them with the Interstate Commerce Commission (R. p. 20). In May, 1916, the petitioner, acting under the authority of the resolution just referred

to, filed with the Interstate Commerce Commission its classification of land line and cable messages and filing forms, together with the conditions under which the various classes of land line and cable messages are handled, and its tariffs and schedules; and all of these are now on file with the Interstate Commerce Commission and have been on file with them continuously since May, 1916 (R. p. 18). There is no rule or regulation of the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks or forms of telegraph or cable companies. None of the petitioner's forms or blanks which had thus been filed with the Commission were used at any time in the receiving or transmission of the message on which this suit is based. The respondents have their main office in Barcelona and had no actual information as to the resolution of the petitioner's executive committee before referred to [illegible] the filing of any forms, blanks, tariffs or schedules with the Interstate Commerce Commission.

Prior to June 18, 1910, and up to and including the month of September, 1917, the rate charged for an unrepeated message between Barcelona, Spain, and New Orleans, La., was forty-four cents per word for defendant's land-line system between New York City and New Orleans, twenty-five cents per word for its cable system between New York City and Havre, France, and thirteen cents per word over the French and Spanish government telegraph systems (R. p. 19). This rate is not a joint rate, but is the sum of the local rates of each of the connecting systems over which the message involved passed. All cablegrams turned over to the petitioner's land-line system by its cable system are handled as land-

line messages, except that the charge therefor is based on the number of words in the message, including the address and signature, whereas in the case of an ordinary land-line message the charge is based solely on the number of words in the body of the message, the address and signature being transmitted free. The amount paid by the respondent to the Spanish telegraph administration at Barcelona for the transmission of the message from Barcelona to New Orleans in the manner heretofore described was $6.60, of which the petitioner subsequently received $1.65, $3.75 of which was apportioned in accordance with the tariff to the transmission from Havre to New York City, and ninety cents to the transmission from New York City to New Orleans. The amount so received is the amount specified in petitioner's tariffs on file with the Interstate Commerce Commission, and is the amount specified in these tariffs for the transmission, without repetition, of a message containing the number of words contained in this message, including its delivery at New Orleans. The respondents made no request to have the message in question repeated. Had they requested the repetition of the said message, they would have been required to pay a higher rate (R. p. 19).

Immediately on receipt of the message at New Orleans, the respondent's office there sold two thousand January cotton at $19.57 per pound, and on September 15, 1917, immediately advised their Barcelona office that they had done so. Thereafter, and without delay, the respondents' Barcelona office advised the New Orleans office by cable that the order was for *two hundred* instead of *two thousand*, and on receipt of this in-

formation the respondents re-purchased eighteen hundred January cotton at $23.01 per pound, as compared with the selling price of $19.57 per pound, resulting in a loss of $30,960, together with commissions of $135.00, making a total of $31,095.00, which amount was actually paid out in cash and lost by the plaintiff as a result of the error in the transmission of the cable involved (R. p. 20).

The case was tried before a jury on an agreed statement of facts. The motion of the respondents for the direction of a verdict for the full amount of the loss shown by the said statement of facts, namely, the sum of $31,095.00, was granted by the court (p. 27), and the motion of petitioner to direct a verdict for $4.65, its proportion of the amount received for the transmission of the message, with interest, was denied. The motion was based on the following ground:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs, filed with the Interstate Commerce Commission, to wit, the amount of the proportion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, sub-division 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations and of the Act of Congress approved June 18, 1910" (R. p. 16).

Judgment was entered in favor of the respondents and against the petitioner for the sum of $31,095.00 with legal interest from February 16, 1918, together with all costs of the suit (R. p 28).

The Circuit Court of Appeals affirmed the judgment of the trial court (R. p. 37).

The petitioner's contention, which was rejected by the trial court and the Circuit Court of Appeals, is that as the message was unrepeated and paid for as such, regardless whether it was or was not written on one of the petitioner's blanks, the recovery should be limited to the amount accruing to petitioner for the transmission of the message, because the duly established regulations of the defendant in effect at the time the message was filed, and the tariffs, rules, regulations and message forms on file with the Interstate Commerce Commission and approved by that body, provided that in the case of an unrepeated message the liability should be limited to the portion of the tolls received by the petitioner. This question was raised by the pleadings filed in the trial court (R. p. 12), by the petitioner's request for a directed verdict (R. p. 16) and by the assignment of errors (R., pp. 30 and 31).

As stated in the opening paragraph, this case presents the question whether the stipulations limiting liability for interstate and foreign telegrams are applicable to all telegrams or only to such telegrams as are physically written on an ordinary message blank on which the stipulations with respect to liability are set forth.

ARGUMENT.

POINT I.

The fundamental purpose of the commerce act would be defeated if the sender could secure a higher measure of liability, for the same rate, by writing his message on plain paper instead of the usual message blank.

The transmission of telegraph messages from one State or Territory to or through another State or Territory is interstate commerce.

Western Union Tel. Co. v. Texas, 105 U. S. 460; 26 L. Ed. 1067;
Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27;
Western Union Tel. Co. v. Boegli, 251 U. S. 315;
Western Union Tel. Co. v. Speight, 41 Sup. Ct. Rep. 11,—U. S.—(not yet officially reported);
Postal Tel-Cable Co. v. Dickerson, 41 Sup. Ct. Rep. 60,—U. S.—(not yet officially reported).

In *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, this court said:

> "That companies engaged in the telegraph business, whose lines extend from one state to another, are engaged in interstate commerce, and that messages passing from one state to another constitute such commerce, is indisputable."

By a long line of decisions of this court the principle is recognized that, in the absence of

congressional legislation on the subject of interstate communication by telegraph, the States are at liberty to apply their own decisions and declarations of policy.

Western Union Tel. Co. v. James, 162 U. S. 650;
Western Union Tel. Co. v. Crovo, 220 U. S. 364;
Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406.

The Act of Congress of 1910.

All the decisions prior to this act rested on the fundamental fact that Congress had not legislated on the subject, and that the State statutes were valid only in the absence of such legislation and until such legislation took place. Since the decisions of this court in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., supra*, and *Western Union Tel. Co. v. Boegli, supra*, it is no longer open to question that the Act of 1910 is such legislation.

The commerce act as amended by the Act of June 18, 1910 (Ch. 309, 36 Stat. L. 544, 8 Compiled Stats., 1916, p. 9053), so far as it is material here, at the time the message in this case was sent, read as follows (the portion in italics and doric type showing the amendments of June 18, 1910, so far as they relate to the question involved in this case):

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means

of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States to any other State, Territory, or District of the United States,* **or to any foreign country,** who shall be considered and held to be common carriers within the meaning and purpose of this act, * * * provided, however, That the provisions of this Act *shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted* **to or from a foreign country** *from or to any State or Territory as aforesaid*" * * *.

Paragraph (3), Section 1, declared:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable,* as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *Provided, That messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night,* **repeated, unrepeated,** *letter, commercial, press, Government and such other classes as are just and reasonable,* **and different rates may be charged for the different classes of messages;** *And provided further That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.*"

And Section 3 read:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable

preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," etc., 24 Stats. at L. 380, 8 U. S., Compiled Stats. page 9094, Sec. 8565.

Section 10 declared that:

"Any common carrier subject to the provisions of this Act * * * who * * * shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, * * * or shall wilfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done not to be so done, * * * or shall be guilty of any infraction of this Act for which no penalty is otherwise provided * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdicton of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense;" etc. U. S. Compiled Stats. page 9174, Sec. 8574.

Sec. 15. (As amended June 29, 1906, June 18, 1910, and February 28, 1920.) (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any

individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

The question whether Congress, by its action in the passing of this amendatory Act of June

18, 1910, has taken possession and assumed control of the field of interstate and foreign commerce by telegraph, was determined definitely and finally by this court in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., supra*, when this court said:

> "In the first place, as it is apparent on the face of the Act of 1910, that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting laws.
>
> "In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.
>
> "In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and

reasonable and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (*Clay County Produce Co. v. Western Union Telegraph Co.*, 44 I. C. C., 670.) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardner v. Western Union Tel. Co.*, 231 Fed. Rep., 405); and by the numerous and conclusive opinions of state courts of last resort which in considering the Act of 1910, from various points of view, reached the conclusion that that Act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action, etc."

The Circuit Court of Appeals for the eighth circuit in *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, at p. 409 (certiorari denied 243

U. S., 644), which was cited with approval in the Warren-Godwin case, said:

> "It appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable, it applies to all interstate telegraph business, that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

Uniformity of obligation, service and LIABILITY the manifest purpose of the Act.

In view of the language of the Act of 1910, and of its interpretation by this court and by the Circuit Court of Appeals for the eighth circuit and by the Interstate Commerce Commission in *Clay County Produce Co. v. Western Union Tel. Co.*, 44 I. C. C. 670, which was also cited with approval by this court in Warren-Godwin Lumber Company case, it is clear that the principles enunciated in the many decisions of this court as to the effect of the provisions in the tariffs of common carriers by railroad are applicable equally to telegraph and cable companies. Those decisions conclusively establish: first, that the public are bound by the tariffs on file with the Interstate Commerce Commission, regardless of knowledge, assent or even misrepresentation (*Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98; *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242; *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, and cases cited therein). Secondly, that a limitation of liability contained in or filed with the tariffs is an essential part of the rate, and that a shipper or passenger is bound thereby, even though he has no knowledge thereof and has not assented thereto (*Boston & Maine Railroad v. Hooker*, 233 U. S. 97, and cases cited therein).

The facts in the Hooker case were substantially similar to those in the case at bar. In that case the plaintiff had checked her baggage on a first class railroad ticket. No inquiry was made of her as to the value of the baggage, nor did she

expressly assent to any limitation of liability, or have any actual knowledge of any tariff provisions on the subject. However, the tariffs on file with the Interstate Commerce Commission, which were the duly established and legal tariffs, contained a provision limiting baggage liability to one hundred dollars in the absence of a greater declared value. On these facts the court held that the recovery for the loss of the baggage due to the negligence of the carrier was limited to one hundred dollars. The court said (p. 110):

> "The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the court did not stop there: In *Adams Express Co. v. Croninger*, *supra*, page 509, it said: 'The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission.' In *Kansas City Southern Ry. Co. v. Carl*, *supra*, page 652, this court said: 'The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actually posted in the station. *Texas & Pacific Railway v. Mugg*, 202 U. S., 242; *Chicago & Alton Ry. v. Kirby*, 225 U. S., 155. It would open a wide door to fraud

and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay * * * (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.' And in *Missouri, K. & T. R. Co. v. Harriman, supra*, this court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, (p. 669), 'not only because referred to in the contract signed by them, but because they have been lawfully filed and published * * *' (p. 671). When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate.' In *Chicago, R. I. & P. Ry. Co. v. Cramer*, 232 U. S., 490, this court said page 493: 'That rule of liability (the uniform rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property.'"

We believe that the Hooker decision is determinative of the question here presented. It was a recognition of the necessity of making effec-

tive the purpose of the Interstate Commerce Act "to have but one rate open to all alike and from which there could be no departure" (*Boston & Maine R. R. v. Hooker, supra*, p. 112). This decision and others like it were based on broad grounds of public policy and without regard to the equity of the claim of the particular litigant. The same reasons of public policy necessitate the enforcement of the tariff limitation in the case at bar.

In *Clay County Produce Co. v. Western Union Tel. Co., supra*, the Interstate Commerce Commission said:

> "Having been declared to be common carriers, and having been subjected to the general provisions of the Act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service. To secure such uniformity in their dealing with the public was doubtless one of the purposes of Congress in subjecting telephone and telegraph companies to the provisions of the Act to regulate commerce, and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. **It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference.**
>
> "**Almost from the beginning of telegraphy in this country, the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being built upon it. The unrepeated rate of charge has always**

been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission, or delays in the delivery beyond the sum received for sending the message."

More than a quarter of a century ago this court recognized the validity of the unrepeated message stipulation (*Primrose v. Western Union*, 154 U. S. 1); and in 1910 Congress placed its seal of approval on that decision by providing that messages might be classified into "repeated, unrepeated, * * * and such *other* classes as are just and reasonable, and different rates may be charged for the different classes of messages." Congress did nothing if it did not recognize that the limitation of liability was an integral part of the rate when it provided that "different rates may be charged for the different classes of messages."

It is evident, therefore, that the limitation of liability to the price paid for sending the message is the prime factor in fixing rates for unrepeated messages. Uniformity in rates can only be maintained by enforcing this stipulation in every case where the class of service chosen is an unrepeated message and the rate charged and paid is based on that classification. To make the enforcement of this condition depend entirely on whether the message was written on a blank form in which this condition is set forth would open the door wide to fraud and discrimination, would violate the fundamental principle that all persons must be charged the same rate for the same service, and would in effect nullify the command of uniformity which is the basic and dominant motive of the Act.

In the courts below counsel for the respondent asserted that the Hooker and similar decisions before referred to were not applicable because the petitioner was not *by law obliged* to file any tariffs with the Interstate Commerce Commission. We submit that this is a distinction without a difference. Whether the petitioner is or is not required to file its tariffs, it is a fact that it had filed them long prior to the sending of the message sued on. The rates and the conditions which were a part of the rates became binding on the public and the company alike *on their adoption by the company* in conformity with the authority vested in it by the Act, and could not be departed from until changed either by the fixing of new rates or by the order of the Commission. Up to the date of the message sued on the Commission had not seen fit to disturb the unrepeated message regulation, but four months before the sending of this message it had held that it had jurisdiction to consider the reasonableness of that regulation, and had held it valid (*Clay County Produce Company v. Western Union Tel. Co., supra*). In its opinion in that case the Commission said (p. 674):

> "Under the act, as has many times been said, *the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges.* But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the

charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The courts have often said that the vital feature of the act to regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in common right as well as in common justice, runs all through the act and through the supplementary legislation enacted in aid of the enforcement of the act. **It can not therefore be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, their rates and charges are nevertheless binding upon such companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service.** To secure such uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless

> rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference."

The Interstate Commerce Act outlined certain steps that must be taken by the various carriers before a rate becomes legal. In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate of regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed before it is legal and effective. In the case of the other carriers subject to the same act, namely, telegraph and cable companies, the act does not require the filing of the rate or the regulation, and in the absence of this requirement the regulation is legal and binding the moment it is fixed and established by the carrier. As pointed out in the *Cultra* opinion, the carrier initiates the rate and the regulation, and once so initiated it is and remains the legal rate or regulation until it is changed by the act of the carrier itself or by the Commission. While the method of establishing a legal telegraph or cable rate under the Act of Congress in question differs from that imposed upon carriers of persons and property, the object in the case of all carriers is the same, namely, the attainment of equality of rate, regulation and service, and the prevention of discrimination.

It is not the physical act of filing of the rate, as such, in the case of carriers of persons and property that creates constructive notice of the regulations under which these carriers are doing

business, but it is the establishment of a *legal rate* or regulation that results in constructive notice on the part of the public: the filing is important merely as the statutory prerequisite to the existence of the legal rate. There would be no uniformity of service if the legal rate or regulation could be deviated from either by accident or design. The test, therefore, which should be applied is not, as we have indicated above, whether a rate or regulation is on file with a regulatory body, but rather whether the rate charged, including the regulation which attaches to and is a part of it, is in fact, the legal rate, and if it is, what service is to be performed and what measure of liability assumed thereunder. As we have pointed out, in the case of carriers of persons and property, a rate is not legal until it is filed, and therefore unless the rate has been filed a carrier cannot in an action at law invoke the doctrine of constructive notice, not because of the physical fact that the carrier has failed to file the rate, but because on account of the failure to file it it has no existence as a legal rate. But filing does not enter into the determination of the question whether a telegraphic rate is or is not the legal rate; the test in the case of a telegram is, was the rate charged *the one initiated by the telegraph company prior to the date of the message, and was it, therefore, the regularly established rate?* If it was, then it is the legal rate, and if it is the legal rate, the doctrine of constructive notice must apply just as forcibly and just as effectively as in the case of carriers of persons and property.

The principal object of filing the defendant's rates and schedules with the Interstate Commerce

Commission was to make it easy for the public to ascertain or for the company to show what the legal rate and regulation was on the particular date and with respect to the particular class of service; it was not because defendant was under any misconception as to the necessity of filing rates or regulations, or as to the effect of such filing on the question of whether a rate or regulation was legal.

In other words, the fact that the Interstate Commerce Commission has not seen fit, under Section 15 of the Commerce Act, to require this petitioner to file its tariffs and regulations is immaterial in view of the fact that the Commission has assumed and exercised the right of regulation and supervision of the tariffs and regulations voluntarily filed by it, and has recognized such tariffs and regulations as the legally established ones. It has expressly recognized those tariffs and regulations as binding upon all until changed; that binding force resting not upon any acceptance of such terms by the shipper when he contracts with the carrier, but upon the reason of public policy which as a matter of law imports knowledge and acceptance of such terms to every shipper, no matter how he deals with the carrier. Such being the case, and those tariffs and regulations having been repeatedly upheld as to the general public, they can not without violation of the provisions against preference and discrimination be invalidated as to a particular class of users of the petitioner's facilities for interstate or foreign commerce.

Further analysis of the Commerce Act.

The question of the defendant filing its tariffs with the Interstate Commerce Commission is also immaterial when considered on a fair analysis of the provisions of the Commerce Act. It is significant that immediately after the enactment of the amendment taking effect August 10, 1910, by which telegraph, telephone and cable companies were made subject to this act to regulate commerce, the Interstate Commerce Commission, after careful hearing of the parties interested, considered the sections of the act which apply to such companies, and in conference ruling 305 in the latter part of the year 1910, or early in the year 1911, announced its conclusion that telegraph, telephone and cable companies must conform to the provisions of Section 1 of the act requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that they may lawfully issue franks covering their interstate service to the same extent as other common carriers under the provisions of that section; also that they were governed by the provisions of Section 3, forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage whatsoever, and that they are subject to the lawful orders of the Commission pursuant to Section 15 of the act, and also to Section 20 thereof.

Let us examine for a moment the effect of these particular sections of the act which the Commission thus concluded applied to and governed actions of telegraph companies.

By section 1, as has been indicated above, they were designated as common carriers under and subject to such provisions of the act as were made specifically applicable to them in the transmission of messages between the States and Territories and from or to foreign countries. By section 1 they were also required, together with all other common carriers named in the act, to make their charges for such transmission just and reasonable, and every unjust and unreasonable charge was prohibited. It was also made the duty of such common carriers to enact just and reasonable regulations and practices respecting the management of their business, and they were also specifically authorized to classify into certain defined classes, messages for transmission and to make different rates for the different classes of messages.

It will be observed that these provisions apply to all classes of transmission companies and necessarily govern all such transmission within the territorial limits of the United States.

By Section 3 of the act it was made unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By Section 15 there was granted to the Commission, either upon its own initiative or upon complaint, power to investigate and examine, and

whenever "the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property, or for the transmission of messages by telegraph or telephone, as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practices so prescribed."

Section 20 deals with reports and methods of keeping accounts, and throws no light on the questions involved in this case.

A careful reading of the sections of this act will indicate that the duties of common carriers

are defined in sections 1, 2, 3 and 4; 2 and 4 have special reference to transportation carriers and do not apply to telegraph and cable companies; 1 and 3 unquestionably do. The subsequent sections of the act relate to the methods, procedure and instrumentalities which, in the opinion of Congress, were necessary to be employed in order to secure the observance of the obligations set forth and enacted in the four sections to which we have referred. These subsequent sections provide different methods by which different classes of carriers are required to proceed in the transaction of their business in the observance of the duties of uniformity of service and equitable dealings with the public as defined in the first four sections of the act.

Thus, Section 6 requires that, *before* carriers of goods and passengers shall embark in the business of such transportation, their rates, fares and charges shall be filed with the Interstate Commerce Commission and be posted at stations, and such carriers are prohibited from engaging or participating in transportation of passengers or property unless such schedules have been thus filed with the Commission and posted; in addition, there is a prohibition against the charging, demanding or collecting greater or less, or different, compensation than such as is provided in the tariff in effect at the time.

It is obvious in tracing the historic development of the act and the amendments made since the original enactment of the legislation in 1887 that the additional requirements in this Section 6, and other features closely connected therewith found in other sections of the act and applicable

to this particular class of carriers, have been added to the act in order to secure from such carriers the due observance of the provisions of Sections 1, 2 and 3 of the act, which remain substantially as originally enacted.

The mere filing of these schedules by this particular class of carriers as provided in Section 6 has no significance or peculiar value with respect to the rates, except as they secure to persons dealing with the carriers equal facilities for protection against unreasonable and discriminatory charges, such as were forbidden by law to the carriers before these special requirements were fixed by Congress. Carriers before such amendatory legislation were under the same substantive obligations with regard to equality of service, rates and facilities as since these schedules have been required to be filed. The fact that such requirements are now exacted of this particular class of carriers is evidence not that any new duties arise because of the filing of these schedules, but that Congress has concluded in its wisdom that by that method alone can the performance of the obligations of Sections 2 and 3 be best secured. There has been no change of obligation. The obligations of the carrier have remained the same at all times, but the method of insuring their performance has, as we have seen, by the amendments to the act, and particularly Section 6, been made much more rigid with respect to this class of carriers. It is also to be noted that while such has been the case with transporters of freight and passengers, the obligation existing under section 3 of the act and under section 1, with respect to

telegraph and cable companies, is precisely the same as that of carriers of freight and passengers. The regulations of both classes of carriers must be reasonable; their charges for service rendered must also be reasonable. Unreasonable charges are equally prohibited to both. The quality of service exacted from both is identical, but in the case of telegraph companies Congress has concluded that it is **permissible for the the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations,** as is also the case with respect to its regulations and classifications of messages and the rates therefor.

The procedure thus differs, but the obligations of the carriers to the public are the same, and the obligations of the public to the carriers are likewise the same, and defined in the same language in sections 1 and 3 of the act.

The establishment of the message classification made it the legal classification, without reference to the fact of filing with the Commission.

When the telegraph company, therefore, by its board of directors, duly enacted the regulations, as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, the rules binding the public were such rules thus enacted until changed by such company or by order of the Commission; and it made no difference whether they were known to the public or not; each class of messages took the rate attaching to that class of messages and the measure of liability as fixed by the regulations for that class. Such

is the effect of the decisions of this court in all the cases which have been before it respecting carriers of freight and passengers, and the fundamental principle which underlies these decisions under section 3, which requires uniformity, applies as completely in the case of transmission of messages as in the case of transportation of persons or property.

In *Stephens v. Ohio State Telephone Company*, 240 Fed. 759, the court said, at page 767:

> "(4) In 1910 (Act June 18, 1910, sec. 7) the Interstate Commerce Act of 1887, and subsequently amended, was further amended to the effect that:
>
> "'The provisions of this act shall apply to * * * telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act.'
>
> "It seems to be clear that the purpose of Congress in this enactment was to classify such corporations as the defendant here, for all purposes so far as the administration of the laws of the United States is concerned, with railroads and other transportation common carriers, for the laws pertaining to interstate commerce, while generally providing for matters of administration of the duties of instrumentalities of interstate commerce towards the public, yet comprehensively bring them within the jurisdiction of the federal courts for all purposes relating especially to their duties as interstate agencies. We cite this act, therefore, to the point that all decisions touching the jurisdiction

of the federal courts under the laws relating to interstate commerce are applicable to situations arising with reference to telephone and telegraph companies, and that we may assimilate controversies respecting interstate traffic by telephone and telegraph with those which deal with transportation of goods and persons."

In other words, the rates and the regulations which were fixed by the telegraph company constitute the only methods by which it deals or is permitted by law to deal with the public until they are lawfully changed. There can be no special transaction outside of those rules and regulations as to either class of carriers.

It is inconceivable that a customer of a telegraph company may, by delivering his message to the telegraph company on a blank piece of paper, and claiming that he had no knowledge of the regulations, acquire protection against error up to thirty-two thousand dollars, while his neighbor and competitor sending a similar message and paying the same rate is limited to four dollars because he has written his message on a blank.

The decision of the supreme court of Kansas in the case of *Shawnee Milling Co. vs. Postal Telegraph Cable Company*, 101 Kas. 307, 166 Pac. 493, is squarely in point, as shown by the (Pacific Reporter) syllabus, which reads:

"Where a telegraphic message is dictated over a telephone and is thus received by a telegraph company for transmission, it will not be presumed that any preferential or discriminatory service in violation of law is intended, and the message will be considered as if it were written on the ordinary

blank forms furnished by the telegraph company, and the company's liability for an error in transmission is neither greater nor less nor different than if the message were delivered in the usual and more formal mode of sending telegrams."

The plaintiff had judgment in that case because the message was intrastate, and it was held that the Federal law did not apply, and certain limitations contained in the defendant's standard message blanks were, under the local law, invalid. It also appeared that the defendant had not filed its schedule of rates and charges with the public utilities commission, as required by law. But the Kansas statute affirmatively required the defendant's rates to be filed, while the Interstate Commerce Act does not.

The court in that case said:

"It will thus be seen that the telegraph company has two principal schedules of rates, one for unrepeated messages in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate fifty per cent. higher for repeated messages, in which its liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These rates must be filed with the Public Utilities Commission and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service is forbidden by the Public Utilities Act. (Gen. Stat., 1915, ch. 97; Laws of 1911, ch. 238, secs. 3, 10, 11, 12, 20, 30.) The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was be-

ing extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by Section 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the Public Utilities Commission and subject to its approval; and such rates and service are invalid until they are so filed, and when formally promulgated, they may not be departed from with impunity. (Gen. Stat., 1915, sec. 8398, 8400, 8416; *State ex rel. vs. Postal Telegraph Co.*, 96 Kan. 298; 150 Pac. 544; *Mollohan vs. Railway Co.*, 97 Kan. 51, 154 Pac. 248.)

"The court is of opinion that in the absence of a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attached to the usual and more formal mode of transacting its corporate business."

POINT II.

The commerce act applies to incoming cablegrams: certainly to their transmission and delivery within the United States.

The only other question which was raised in this case—namely, whether the stipulations limiting liability which are a part of the rates for interstate telegrams and foreign cables apply to incoming cable messages (so far as their transmission within the United States is concerned), while never seriously in question, has, we think, just been expressly answered by this court. It was necessarily involved in the decision in *Galveston, Houston & San Antonio R. R. Co. v. Woodbury, et al.*,—U. S.—, 41 Sup. Ct. Rep. 114, where the court said:

> "But counsel for Mrs. WOODBURY insists that solely because her journey originated in Canada, the provisions of the Act to Regulate Commerce do not apply. The contention is that Section 1 of the act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. (*Boston & Maine R. R. Co. v. Hooker, supra.*) The second is that **the Act does apply to the transportation of both passengers and property from an adjacent foreign country**, such as Canada. Section 1 declares that the Act applies to 'any common carrier * * * en-

> gaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country.' A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. **The test of the application of the Act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation.** This is the construction placed upon the Act by the Interstate Commerce Commission."

The provisions applicable to telegraph, telephone and cable companies (at the time this message was sent)* applied to such companies engaged in "sending messages from one State, Territory or District of the United States, to any other State, Territory or District of the United States, or any foreign country."

It is true that rights and obligations of the parties under a contract of carriage to be performed in several different states or countries will ordinarily be determined by the *lex loci contractus* (*Liverpool*, etc. *Steam Co. v. Phoenix Insurance Co.*, 129 U. S. 397); but this general principle is subject to the exception that the

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* The present language of the act is [41 Stats. 456, chap. 91, sec. 400, (1) (c)]: "the transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other other place in the United States, *or from or to any place in the United States to or from a foreign country, but only in so far as such* transportation or *transmission takes place within the United States.*"

contract will not be interpreted or enforced in accordance with the foreign law when to do so would be to violate the public policy of the forum; and this is particularly true where, as in this case, the wrong complained of occurred in the jurisdiction in which the suit is brought. (*Corpus Juris*, title *"Contracts,"* vol. 13, p. 257.)

In the *Kensington* case, 183 U. S. 263, this court refused to recognize a provision of a contract of carriage exempting the carrier from liability for negligence, though such provision was valid under the law of the place where the contract was made.

The court said (p. 269):

> "As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine

that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. (Story, Conflict of Laws, sections 38, 244.) Whilst as said in *Knott vs. Botany Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & Great Western Steam Co. vs. Phoenix Ins. Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made in one of the states of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to

the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion."

It is evident we believe that an agreement made in a foreign country by the petitioner to send cablegrams from foreign points to the United States at less than its tariff rates would be invalid and unenforceable in this country. Likewise an agreement made in a foreign country by petitioner to repeat all telegrams in the United States in spite of the fact that only the unrepeated message rate was charged would be illegal and unenforceable in our courts. Yet this would be merely doing directly what the respondents seek to do by indirection, namely, to pay the lower rate provided for an unrepeated message, and to escape the limitation of recovery to the price paid for sending the message, which is the basic factor in fixing that rate, solely and admittedly because the message was not delivered originally to the petitioner on one of its blank forms in which the limitations of liability attaching to the various classes of service are set forth.

We contend that public policy requires that the tariff provision be enforced whether the contract is made in this country or in a foreign country. It seems to us that to promulgate a contrary rule would make evasion of the Interstate Commerce Act simple and would result in discrimination in rates in favor of foreigners as against our own citizens. It is inconceivable that such a result should be permitted by the courts of this country, particularly when, as here, the breach of duty occurred and the cause of action accrued within the territorial limits of the United States and there was a separate rate

fixed (see R., p. 19) for the performance of that part of the contract which was to be executed in this country.

The error which is the basis of this cause of action occurred in the course of transmitting the message between New York and New Orleans; the rate paid by the plaintiff was a combination rate, one component part of which was the rate from New York to New Orleans. Respondents were not entitled to any greater service nor should the petitioner be subjected to any greater liability in the transmission of this message from New York to New Orleans than if it had been an ordinary unrepeated message originating in New York. That in such a case the *Hooker* and similar cases control and require the enforcement of the tariff limitation of liability has already, we hope, been clearly demonstrated.

In *Commercial Cable vs. Western Union Telegraph Co.*, 45 I. C. C. 33, the Commission said (p. 38):

> "The defendant contends that the rates on messages from points in foreign countries to points in the United States are through rates; that this Commission has no jurisdiction over such through rates; that the defendant has no 'rates' on deferred messages from New York to points in the United States, the earnings received by the defendant on such messages being simply portions of the through charges accruing as divisions to the defendant for its part of the through services.
>
> "Apparently the rates on messages from points in foreign countries to points in the United States are not 'joint through rates'

such as those published by a railroad which holds the concurrences of its connections. The through rates, however, are made by adding together the rates or half rates of the several telegraph and cable companies which participate in the transmission, and thus the complete charge for the through service can readily be ascertained and quoted to the sender at point of origin. As previously stated, the through charge on a deferred message from an interior point in France to an interior point in this country would consist of three component parts, the French government reciving one-half its local rate to Havre, the cable company receiving half its regular cable rate, and the land line in the United States receiving half its rate on regular cable messages. It is clear, therefore, that **the through rate is a 'combination' rate, one component part of which is the charge made by the land line for transmitting the message from New York to destination.**

"It may be observed that the transmission of a through message is not a continuous service. The message must be transferred from a land line to a cable line on the European shore, and again transferred from a cable line to a land line at New York; and the defendant concedes that **'so far as defendant is concerned,' the messages may be regarded as originating in New York. Looking at the matter from this point of view it is clear that we have authority under the act to require the defendant, in imposing charges for its service within this country, to avoid unjust discrimination,** not only as between persons, but as between carriers."

POINT III.

Mistakes of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals will be found in the transcript of the record at page 37. The first error in the court's opinion is the statement (R. p. 40) that at the time of the handling of the message the Interstate Commerce Commission, so far as telegraph, telephone and cable companies are concerned, had not exercised any of the powers conferred on it by Sections 15 and 20 of the Interstate Commerce Act. Four months prior to the handling of the message, as pointed out earlier in this brief, the Interstate Commerce Commission had exercised some of these very powers. (*Clay County Produce Company v. W. U. Tel. Co.*, 44 I. C. C. 670.)

The court of appeals also states (R. p. 41) that the act to regulate commerce does not provide a limitation of liability not contracted for by the parties, and concludes that in the absence of a statutory or contractual modification of such liability the parties to the message are entitled to recover all the damage that results proximately from the breach of duty. This construction of Section 1 of the Act would, as to telegraph companies, make the Act meaningless. The Act of 1910 was designed to protect the public. It meant nothing if it did not mean that thereafter in determining the effect of all contracts between the public and the carriers subject to the Act, which include telegraph, telephone and cable companies, the Act must be deemed to be a part of the contract; and not only did it prohibit the making of any contract in conflict with the Act, but any *special* and particular contract at all.

In *Pennsylvania Railroad Co. v. International Coal Company*, 230 U. S. 184, this court said:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6 *Armour Co. v. United States*, 209 U. S. 56, 83.) **The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike.**"

We believe that the telegraph company's classification of messages and the regulations affecting each class, which were duly adopted by its Board of Directors pursuant to the Act, as shown by the stipulation of facts, (R. p. 17) and which regulations and classifications were on complaint of a user of the telegraph, after full hearing, approved as reasonable by the Interstate Commerce Commission, (*Clay County Produce Co. v. Western Union Telegraph Co., supra*), likewise have the force of a statute, binding on the telegraph company and customer alike.

The court of appeals also said (R. p. 41) that the Act was not intended to enable a carrier to escape liability for a breach of its undertaking to render a service by showing that the party for whom the service was rendered was charged less than the reasonable value or less than the amount exacted from others for similar services; and later (R. p. 42) that the fact that there was an unlawful discrimination in favor of the sender of the telegraph message would not enable the carrier of such message to escape liability where the discrimination in favor of the sender was without his knowledge or consent.

But the fallacy of this is evident. The court proceeded on the theory that the sender of this message desired repetition and was willing to pay the appropriate rate therefor, but that without any fault on his part he was kept in ignorance of the choice, which in fact was his, between the unrepeated rate with a limited liability and the repeated rate, involving double transmission service and a greater measure of liability. There is however no warrant for this assumption in the record. All telegraph administrations, including the French and the Spanish Government lines* as well as the petitioner, provide by their regulations for the repetition of messages at an additional cost; and although in the nature of things repetition is the only absolute safeguard against error, it affirmatively appears in this case (R. page 19) that the sender did not ask for repetition. If the message had been repeated, therefore, he could not have been compelled to pay for the extra service and the greater liability; if the court determines that he secured for the minimum rate, not only the liability appropriate to the repeated message rate but

* The International Telegraph Convention of St. Petersburg (Lisbon Revision, 1908), to which the French and Spanish government telegraph administrations are parties, contains the following:

"Collated Telegrams.

"LI.

"1. The sender of a telegram has the right to request that it be collated. In this case he writes before the address the instruction 'Collation' or 'TC.'

* * * * * * * * *

"3. The collation, which consists of the entire repetition of the telegram (including the preamble), is given on all instruments by the receiving office immediately after the transmission of the telegram, or of the series containing the telegram to be collated.

* * * * * * * * *

"4. The charge for collation is a quarter of the charge for an ordinary telegram of the same length between the same points."

actually a liability without limit, the court is commanding the telegraph company to do the very thing which is forbidden by the act: that is, to discriminate in favor of Esteve Brothers and against the sender of a similar message who wishes the double service and selects and pays the higher rate.

The Circuit Court of Appeals says:

> "No provision of the Act purports to put it in the power of a carrier of messages by telegraph or cable to bind senders thereof by conditions not brought to the notice of the latter." (R. p. 43.)

This statement can be answered best, perhaps, by saying that no provision of the Act purports to give the other carriers subject to the Act similar power, yet this court has repeatedly held that the public is bound by the duly established rates and tariffs of the carriers of persons and property; and certainly there is nothing in the Act which evinces an intention by Congress to place telegraph, telephone and cable companies in any different position in this respect from the other carriers.

Conclusion.

In conclusion we think it not amiss to repeat and emphasize the following from our petition for certiorari:

"While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office.

This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank."

We respectfully submit that it is immaterial in law whether a message when delivered to a telegraph company is written on a printed blank containing the usual limitations of liability, and that the sole test is what class of service was chosen: if the unrepeated message was chosen and the rate paid was the unrepeated message rate, then the stipulation limiting the liability in respect of such a message to the amount received by the telegraph company for handling it, which stipulation is a necessary part of the rate itself, immediately attaches to the message and limits the recovery. The liability of the petitioner here should be restricted to the sum of four dollars and sixty-five cents, with interest.

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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No. 491

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

Brief for Respondent.

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STATEMENT OF THE QUESTIONS OF LAW INVOLVED.

From our point of view, the accurate statement of the vital questions involved in this case is this:

Where a cable company accepts in Havre, France, a cable for transmission to New Orleans, Louisiana, **without limiting its liability in any way,** and makes a negligent error in transmitting the message, thereby causing a loss of

$31,095.00, can the cable company escape liability on the ground that it has filed tariffs in Washington, D. C., providing for the use of forms containing a limitation of liability where *(a)* there is no law requiring the filing of tariffs by a cable, telegraph or telephone company, *(b)* the tariffs, as filed in Washington, and the forms accompanying the same, applied only to telegrams and to cables sent **from** this country and not to cables received abroad, and *(c)* the only reference in the tariffs, as filed, to any limitation of liability was by the provision for the use of certain forms for the sending of messages containing a limitation of liability, but **no such forms were, in fact, used.**

Is the public put on notice of tariffs not required by law to be filed?

Does the general rule that one is not charged with constructive notice by the recordation of instruments for the recordation of which the law makes no provision, specially fail in application to telegraph companies?

Must one sending a telegram without any limitation of liability make fresh inquiry daily to ascertain whether or not the particular telegraph company by which he sends the message has seen fit to file a tariff providing for limitation of liability not actually expressed or known and to which no attention is called? If the sender is told on May 1st, 1916, that the telegraph company has filed no tariffs, is he put on notice on May 2nd, 1916, that the company has elected to file tariffs?

Where no limitation of liability is called to the attention of the sender of the cable, or known to him, much less agreed to by him, can a constructive agreement to such limitation of liability be manufactured in its own favor by a telegraph company by its voluntary decision to place a tariff on file in Washington when the law makes no requirement and no provision for such filing, and such filing is not a prerequisite to the establishment of a legal rate?

May a telegraph company determine for itself whether it will file tariffs or not, and may it regulate the rights of the public by its uncontrolled and uncommunicated decision?

Is the contention of the petitioner herein sound, that a telegraph company may make limitations binding on the public by merely adopting them through its Board of Directors, **even without any filing of tariffs** and without communicating or calling them to the attention of the public; and are customers without knowledge of such limitations bound by such *ex parte* and uncommunicated regulations so adopted? (See pp. 23, 30 and 31 of petitioner's brief.)

Where a telegraph company voluntarily elects, independent of any requirement or provision of law, to file tariffs providing that knowledge of a limitation of liability shall be brought home to customers by the use of forms containing an express limitation in cases of cables sent in this country, will a limitation of liability be created in favor of the telegraph company in case of a cable received abroad where the forms so provided for are, in fact, not used and

no knowledge of the limitation of liability is brought home to the sender?

These are the questions which the defendant telegraph company, petitioner here, asks this Court to decide in the affirmative.

SUMMARY OF FACTS.

Plaintiffs, on September 13th, 1917, sent from Barcelona, Spain, a telegram addressed to Esteve Brothers, in New Orleans, **not in cipher, but in plain English,** directing the sale of two hundred bales of future cotton. The words "two hundred" were written out in letters and were not in figures. By negligence on the part of the employees of the defendant company, the message was delivered reading "two thousand" instead of "two hundred" bales. The resultant loss was $31,095. (Agreed Statement of Facts, Tr., p. 29.)

There was no clause limiting liability in the form upon which the message was sent.

A telegraph company is admittedly not required, either by law or by any regulations of the Interstate Commerce Commission, to file its tariffs. The Interstate Commerce Act, prior to 1910, did not contain any provisions whatsoever applying to telegraph or telephone companies. In 1910 it was amended (Act of June 18th, 1910, c. 309, Sec. 7, 36 Stat. 544) and certain special provisions of the Act were extended to such companies. Many of the provisions applying to carriers were not, however, so extended, among them

the provisions as to the filing of tariffs, which were not made applicable to such companies.

The Western Union Telegraph Company did not file any tariffs until May 2nd, 1916, six years after the amendment of 1910. Its directors then apparently decided that it would be to the interest of the company to voluntarily place its tariffs on file, and voted so to do. **It does not appear that since May 2nd, 1916, the Telegraph Company has kept any tariffs on file at its offices open to public inspection and conspicuously posted** (as carriers are required to do). Other telegraph companies and telephone companies generally are not shown ever to have filed any tariffs. The tariff which the Western Union elected to file in Washington on May 2nd, 1916, provided for the use of certain forms for the transmission of cable messages from this country, which forms contained an express limitation of liability. Those forms were not adopted or prescribed for use in connection with cables not sent by the Western Union in this country, but received by it abroad. Those forms were not used in this case.

There was no clause in any way limiting liability in the form upon which the telegram was sent. It is not claimed that there was any contract or agreement in fact by which the defendant's liability was limited in consideration of the message not being repeated. There was in fact no reference at any time to repetition of the message, and it is not contended or shown that the plaintiff's attention was ever

directed to the possibility of repeating messages at an increased rate, or to the defendant's schedule of rates.

The case, is, therefore, radically distinguished from *Primrose v. Western Union Telegraph Company, 154 U. S. 1,* and the cases following that decision, including the late decision of *Postal Telegraph-Cable Company v. Warren Godwin Lumber Company, 251 U. S. 27.* It is likewise radically distinguished from *Adams Express Company v. Croninger, 226 U. S. 491.* **In all of those cases, unlike the present case, there was an express provision in the telegraph blank or bill of lading, signed by the sender of the telegram or the shipper of the goods, expressly agreeing to a limitation of liability or expressly making a representation of value.**

The sole question raised in those cases was the legal validity of an express limitation of liability expressly made and contracted for. In this case, there was no limitation of liability made or agreed to in fact, or even called to the attention of, or known to, the sender.

Notwithstanding, however, the absence in this case of any agreement to limit liability, and the absence of any representation of value, the defendant asks the Court to relieve it of liability for its error, to throw upon the plaintiff the burden of the loss sustained, and to manufacture for defendant's negligent benefit a limitation of liability which did not exist in fact, upon the theory that such a

result can be justified by an extension of the doctrine of *Boston & Maine Railroad Company v. Hooker, 233 U. S. 97.*

That the doctrine of that case cannot apply here will, we think, be demonstrated by the following analysis of that decision in the light of the pre-existing law, and the special grounds upon which it went, coupled with a consideration of the radical difference between the provisions of the law relating to telegraph and telephone companies and those relating to carriers.

The Hooker Case Departed from the Settled General Rule (Denying a Limitation of Liability Without Clearly Expressed Contract Therefor) Only Because of the Peremptory Requirement of the Law Requiring Railroads to File and Post Tariffs and Providing That No Legal Rates Exist Without Such Filing. There Is No Such Requirement of the Law as to Telegraph and Telephone Companies, Whose Rates Are Effective Without Filing.

In *Boston & Maine Railroad Company v. Hooker, 233 U. S. 97*, the Supreme Court held (Mr. Justice Pitney dissenting) that where a **railroad** company had, pursuant to the **requirements** of **law,** and the **requirements** of **regulations** adopted by the Interstate Commerce Commission, filed and published its tariffs in the manner **required by law,** a passenger was put upon notice of limitations and rate provisions contained in the tariffs **required** to be filed by law and regulations, and actually filed; and that where

a baggage check was issued **in the form provided by the tariffs** so filed and published in compliance with law, there was incorporated in such check, by presumption of law, all the conditions and provisions in such tariffs. The decision made new law. (See the dissenting opinion of Mr. Justice Pitney and the comment in *27 Harvard Law Review 737.)* It has always been the admitted Federal rule, reiterated by this Court, that the normal shipment of goods is with liability for the entire actual value of the goods *(Railroad Company v. Fraloff, 100 U. S. 24; The Majestic, 166 U. S. 375);* and that such liability cannot be restricted without the express actual consent of the shipper. Thus, in *The Majestic, 166 U. S. 375* (at *page 384),* the Court said:

> "In New York Central & Hudson River Railroad v. Fraloff, 100 U. S. 24, 27, this Court said: 'It is undoubtedly competent for carriers of passengers, by specific regulations, **distinctly brought to the knowledge of the passenger,** which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk."

(The black letters in the above extract are by the Supreme Court itself, and not by us.)

In *Cau v. Texas & Pacific Railway Company, 194 U. S. 427,* the Court said:

> "There can be no limitation of liability without the assent of the shipper."

And in *New Jersey Steam Navigation Company v. Merchant's Bank, 6 How. (U. S.) 344* (at *382*), the Court said:

> "If any implication is to be indulged in from the delivery of the goods under the general notice, it is as strong that the owner intended to insist on his right and the duties of the carrier as it is that he assented to their qualification."

In the *Croninger case (226 U. S. 491)*, and the *Primrose case (154 U. S. 1)*, and all of the cases following those decisions, there was, as we have already pointed out, in each and every case, an express agreement by the shipper, or an express representation of value, which made all of these decisions entirely consistent with the general rule laid down by the Court in the *Fraloff (100 U. S. 224)*, *Majestic (166 U. S. 375)*, *Cau (194 U. S. 427)* and *New Jersey Steam. Navigation (6 How. 344) cases.*

In the *Hooker case (233 U. S. 97)*, the Court for the first time departed from its own earlier statements of the rule governing the rights of shippers as set out in the cases last above referred to. Those earlier statements represented not only the Federal law as declared by the Supreme Court, but the rule recognized by the authoritative courts of last resort of the various States, by all of which it was held that a limitation of a carrier's liability must be expressly agreed to by the shipper and that not even knowledge or notice of limitations established by the carrier would bind the shipper unless it was shown that he had expressly assented thereto.

See *Boston & Maine Railroad Company v. Hooker, 209 Mass. 958, 95 N. E. 946,* where the Supreme Court of Massachusetts thus stated the general rule:

> "The common law rule fixing the rights of the parties is not open to doubt. It is that, respecting the transportation of baggage or merchandise, a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It may not exonerate itself by regulation or by contract from liability for its own negligence but it may make just and reasonable stipulations in good faith as to the value of the property entrusted to its care and the amount for which it shall respond in case of loss even though occurring through its own negligence. **Such stipulations must be brought home to the knowledge of the shipper either through a formal contract or express or inferable notice under circumstances warranting the assumption of actual assent."** (Black letters throughout this brief are ours, unless specially otherwise noted.)

In *Hutchinson on Carriers, Third Edition, Section 406,* the rule is thus stated:

> **"Mere notice is not sufficient—What constitutes special contract.**—But while the cases admit the power of the carrier to qualify his risk by special contract, it is at the same time denied that he can do so by a mere notice to the bailor, **or by anything less than a special or express contract.** It therefore becomes important to determine what is to be understood by the term special contract in the mean-

ing of these cases, and what is required to be done between the carrier and his employer to create such a special or express contract as the law requires. According to all the English cases on the subject of limitation of liability by notice, a contract sprung from a knowledge of the notice. The theory upon which they all stand is that, if a party, **knowing** his published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and the employer. And as between parties who are not carriers and other persons who deal with them, there can be no question but that this is the law, upon the most obvious principles. But, as has been said, such notice with knowledge of it does not constitute a contract, but is merely evidence from which a jury is bound to imply one as effectual as if it had been expressed. **An express contract cannot, therefore, spring from a notice unless something be done by the party to be affected by it to make it binding upon him.** If, however, there be an express assent to the notice it would be equivalent to an express contract. And this is the sense in which the words are to be taken when it is said that the contract, to avail the carrier, must be special; and the bailor or shipper is considered as assenting to the terms of the notice when he takes a bill of lading or receipt for his goods embodying the notice, which makes it a special contract between himself and the carrier."

In *Ferris v. Minneapolis, etc., Railroad Co., 143 Minn. 90, 173 N. W. 178 (June, 1919)*, the Supreme Court of Minnesota reiterated the rule generally applied and expressly declined to follow the decision in the *Hooker case*. The ship-

ment there was an intrastate one, but the statutes of Minnesota contained the same requirements as to the filing of tariffs and rates for intrastate shipments as the Acts of Congress provide for interstate shipments. The Court declined to follow the *Hooker case* and incidentally pointed out that since the decision in that case, Congress had provided a substantial modification of the law. (See U. S. Compiled Statutes, 1916, Sec. 8604a.)

Other State Courts have likewise refused to follow the Hooker decision in intrastate cases. (See *Mitchell v. Frank Parmellee Co., 209 Illinois Appeals, 428; L. & N. R. Co. v. Rieley, 121 Va. 469, 93 S. E. 574; Shawnee Milling Co. v. Postal Telegraph Cable Company, 101 Kas. 307, 166 Pac. 493.)*

We refer to these cases, of course, merely as emphasizing the harshness of the Hooker decision and the extent to which it has generally been considered to break in upon the fundamentally established general rule. We submit that the Court will not be disposed to extend it to any case which is not necessarily within it. The present case is radically different for this reason:

Railroad companies are required by law and by the regulations of the Interstate Commerce Commission to file and publish tariffs. Telegraph companies are not. An analysis of the *Hooker case* demonstrates the fundamental character of this distinction.

The whole basis of the decision in the *Hooker case* was the point that **railroad** companies are **required,** by law and

by the regulations of the Interstate Commerce Commission, to file and publish tariffs; that **it is the act of filing the tariffs which itself legally establishes the rates;** that as the law **requires** such railroad tariffs to be filed and published, shippers are bound to take notice of the law; that shippers are, therefore, bound to take notice of tariffs filed in pursuance of the law and are bound by all provisions contained in such tariffs. These statements will be borne out by an examination of the opinion in the *Hooker case* as reported in Vol. 233 U. S., pages 97, *et seq.*

At page 107, in stating the facts as found in the Court below, the Court said:

> "The Court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, **in accordance with the Act of Congress** relating to interstate commerce and amendments thereto **and the orders and regulations of the Commission,** schedules giving the rates, fares and charges for transportation between different points, including Boston and Sunapee Lake Station, all terminal, storage and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations which in any way affected or determined such rates, fares and charges or the value of the **service rendered to passengers;** that during the same time, **in accordance with an order of the Commission** of June 2, 1908, making comprehensive regulations as to rate and fare schedules, **the defendant had placed with its agent** in Boston all rate and fare

schedules and the terminal and other charges applicable to that station, and had enabled and required him **to keep in accessible form a file** of such schedules, and had instructed him to give **information** contained therein to all seeking it **and to afford to inquirers opportunity to examine the schedules,** and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the Commission with reference to such schedules."

At page 108, the Court said:

"That **notices were posted at or near the offices** where passengers' tickets were sold in the Boston station, **stating that tariffs naming the rates on interstate traffic were on file with the agent** and would be furnished for inspection upon application and that notices were **posted in the baggage room** of that station, **in a conspicuous place** and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding $100 in value would be checked free for each passenger on presentation of a first class ticket and containing information with reference to excess weight."

At page 113, in discussing the case, the Court said:

"It follows, therefore, from the previous decisions in this Court, that if it be found that the limitation of liability for baggage is **required** to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, **as required by the**

> **statute and the order of the Interstate Commerce Commission,** she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

At page 114, the Court quoted, in support of its conclusion, the provisions of Section 6 of the Interstate Commerce Act, as amended by the Hepburn Act on June 29, 1906. **It is admitted** (as we point out more elaborately hereinafter) that this section does not apply to telegraph companies and that they are not required to file tariffs thereunder.

At page 115, in discussing the application of Section 6 to railroad companies, the Court said:

> "It is to be observed that the schedules are **required** to state, among other things, in naming certain charges, 'all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.' The question, then, is, did the limitation as to liability for baggage based upon the requirement to declare its value when more than

> $100 was to be recovered, come within that provision?"

At page 117, the Court said:

> "Turning to the act itself, we think the conclusion that **this limitation is a regulation required to be filed by the act** is strengthened by Section 22, which provides: '* * * But before any common carrier subject to the provisions of this act shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it **shall** file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, **together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by Sec. 6 of this act.'** This section would indicate that Congress thought that paragraph 6 of the act had to do with specifications of the amount of baggage which would be carried free and that **such regulations should be filed under the requirement of paragraph 6** to which it referred."

Section 22, thus referred to, has no application to telegraph companies.

At pages 118, et seq., the Court discussed at length the regulations of the Interstate Commerce Commission **requiring** the filing of passenger schedules. In the present case, it is admitted that the Interstate Commerce Commis-

sion has made no regulations requiring the filing of any tariffs by telegraph companies. (See Transcript, p. 26):

> **"It is further admitted that there is no rule or regulation adopted by the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks or forms of telegraph or cable companies."**

At page 120 the Court stated its conclusion:

> "But the effect of the regulations, filed **as required,** giving notice of rates based upon value when the baggage to be transported was of a higher value than $100, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100 only."

A consideration of this language leaves, we submit, no room for doubt that the entire basis for the Hooker decision was the fact that Section 6 of the Interstate Commerce Act, and the regulations of the Commission thereunder, **required** the filing of tariffs by railroad companies containing a detailed statement of any rules or regulations which in any wise affected rates. The law, by Section 6, requires railroad companies to file tariffs and rates. The law also requires railroad companies to comply with the regulations of the Interstate Commerce Commission. The regulations of the Interstate Commerce Commission require railroad companies to file detailed statements of all rules or regulations which affect rates or the value of services

rendered. All these are requirements of the law. The law, therefore, makes it **mandatory** for limitations of liability which affect rates to be filed in Washington and published. As the law makes these requirements, shippers are bound to know the law. They are put upon notice of the fact that tariffs and rates embodying limitations are filed in Washington and are published, open to public inspection. They are, therefore, bound to inquire as to what are the provisions of tariffs or schedules so filed and published, and they are held to a knowledge of the contents of those tariffs and schedules and to a consent thereto.

This is the reasoning of the *Hooker case*. It is, upon its face, inapplicable to telegraph companies which are not required by law to file or publish tariffs and whose rates are not necessarily legally dependent upon the filing of such tariffs, as are the rates of railroad companies.

Stating the result in other language:

The *Hooker case* holds that a limitation of liability is a part of a rate of a railroad company; that rates of railroad companies can be legally established and made effective only by the filing of a tariff with the Interstate Commerce Commission, and its publication; that once a rate is established by such filing and such publication, it has the force of law and binds the shipper, who is bound to take notice thereof.

But telegraph companies are not required by law to file or publish rates. They may make rates effective without

filing or publishing tariffs. The tariffs of telegraph companies, and the rates therein, have, therefore, not the force of law. Provisions therein contained as to the limitation of liability have equally not the force of law; and they are not binding upon a shipper who has not assented to them and who, in fact, has no actual notice or knowledge of them but has never heard of them.

If it were necessary to find any further evidence than the evidence contained in the opinion itself, that the *Hooker case* is based upon the fact that railroad tariffs (unlike telegraph tariffs) are required by law and regulations to be filed and published, and that rules and regulations affecting rates included in such tariffs have, therefore, the force of law, such evidence is to be found in the language of Section 6 of the Interstate Commerce Act and in the decisions preceding the *Hooker case* which construed that section.

Section 6 of the Commerce Act, which is the section requiring the filing of tariffs by railroad companies, was not amended in 1910. Upon its face, that section applies only to carriers of persons and property. Thus, the section provides that every carrier **shall** file and publish schedules showing the rates "for **transportation**" between different points on its own route and between points on its own route and points on the route of "any other carrier **by railroad, by pipe line or by water** * * *." The section further requires that the tariffs shall state "the places between which **property and passengers** shall be carried",

and that they shall also state "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the **passenger, shipper or consignee.**"

It is the language last quoted which was particularly relied upon by the Court in the *Hooker case*, on the ground that the limitation of liability there affected the rate and charge and the value of the service rendered to the passenger, and therefore **was required** to be filed. This language is, of course, clearly inapplicable to telegraph companies.

Further provisions of Section 6 require tariffs to be posted "in every depot, station or office of such carrier where **passengers or freight,** respectively, are received for transportation."

The section further provides:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation **of passengers or property,** as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation **for such transportation of passengers or property,** or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the

> tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the **transportation of passengers or property**, except such as are specified in such tariffs. * * *."

There is no such prohibition applying to telegraph companies or the transmission of messages.

In *Texas & Pacific Railway v. Abilene Cotton Oil Company, 204 U. S. 426* (at *437*), the Court, speaking of the Interstate Commerce Act as applied to railroad companies, said:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, **made it unlawful to depart from the rates** in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. **It was made the duty of carriers** subject to the Act **to file** with the Interstate Commerce Commission created

> by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules."

But there is no requirement that telegraph companies should file and publish schedules, and there is no penalty imposed upon them for not establishing and filing such schedules.

At *page 439 of the Abilene case (204 U. S.)*, the Court said:

> "And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers **the positive duty** to establish schedules of reasonable rates which should have a uniform application to all **and which should not be departed from** so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 164; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Ry. Co., 167 U. S. 479.*"

But no positive duty has ever been placed upon telegraph companies to establish schedules of rates, or, having established such schedules, not to depart therefrom except in a particular manner. Telegraph companies are not required to file tariffs; and if they do voluntarily file them **they may change them or depart therefrom** without filing the changes **and incur no penalty for so doing.**

In *United States v. Miller, 223 U. S. 599* (at *602*), the Court, again speaking of the application of the Interstate Commerce Act to railroad companies, said:

> "That the act imposes upon common carriers subject to its provisions **the duty of establishing in a prescribed mode** the rates, whether individual or joint, to be charged for the transportation in interstate commerce of property over their lines, and that **the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed** by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of this Court."

In *Texas & Pacific Railway v. Cisco Oil Mill, 204 U. S. 449*, the Court said (at *p. 452*):

> "While Section 6 forbade an increase or reduction of rates, etc., 'which have been established and published as aforesaid', otherwise than as provided in the section, we think the publication referred to was **that which caused the rates to become operative.**"

But rates of telegraph companies are not established by the filing of tariffs. They are effective without filing.

See, also, *Kansas City Southern Railway Company v. Carl, 227 U. S. 469; Missouri K. & T. R. Company v. Harriman, 227 U. S. 657; Chicago R. I. & P. Ry. Co. v. Cramer, 232 U. S. 490*, all of which proceed upon the principle that a rate required by law to be published becomes a part of the law,

and agreements as to value, etc., become themselves part of the rate thus made part of the law.

These decisions all further demonstrate the correctness of our analysis of the *Hooker case* as hinging upon the fact that the tariffs of railroad companies are required by law (and by regulations of the Interstate Commerce Commission having the force of law) to be filed and published, and that when so filed and published, they have themselves the force of law and may not be departed from. None of this is applicable to telegraph companies.

Under the Interstate Commerce Act, as Amended, Telegraph Companies Need Not File or Post Tariffs and Their Rates Are Effective Without Filing.

Prior to 1910, the Interstate Commerce Act did not apply in any respect to telegraph, telephone or cable companies. By act approved June 18th, 1910, c. 309, Sec. 7, 36 Stat. 544, Sections 1, 3, 15 and 20 of the act were so amended as to make certain provisions thereof apply to such companies. There were in all at that time twenty-four sections of the Interstate Commerce Act, and none of the remaining ones were extended in any particular to telephone, telegraph or cable companies. Shortly after the adoption of the 1910 amendment, the Interstate Commerce Commission had occasion to consider the extent to which the act, as amended, applied to such companies and made an official report to Congress embodying its conclusion. See 25th Annual Report of Interstate Commerce Commission (1911), where the

Commission said, at pages 5 and 6 (see Record, pages 16, 36):

> "Section 1 of the act, as amended June 18, 1910, provides that the act shall apply to telephone, telegraph and cable companies, whether wire or wireless. Numerous questions were asked informally as to the instances in which and the extent to which the provisions of the act applied to such companies. In December, 1910, the Commission heard arguments upon certain of such questions, and in March, 1911, expressed its views as to what telegraph and telephone companies are subject to the provisions of the act and the nature and character of services which would render a telegraph or telephone company subject thereto. It was there said that such companies are subject to the provisions of sections 1, 3, 15 and 20 of the act in so far as the terms thereof appropriately apply to such companies.
>
> "Section 6 of the act requires each carrier to print, file and post schedules of its rates, fares and charges 'for transportation between different points on its own route and points on the route of any other carrier by railroad, by pipe-line, or by water, when a through route and joint rate have been established,' and provides that 'the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried * * * and shall also state separately all terminal charges * * *which in any wise change, affect, or determine any part of the aggregate * * * charges or the value of the service rendered to the passenger, shipper, or

consignee.' It requires that such schedules shall be printed and copies thereof posted 'in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation.'

"There appears to be no requirement for publication, filing and posting of the schedules of charges for the transmission of telegraph, telephone or cable messages between different places on the same route or line or from a place on one route or line to a place on another route or line.

"The foundation of efficient regulation, both as to the reasonableness of rates and undue discrimination, rests in lawfully established charges, and it would seem that such lawfully established charges should be contained in **officially** filed schedules, which **would** be binding upon the telephone, telegraph and cable companies and those for whom such companies perform service.

"The **prohibitions and penalties of** Section 1 of the Act of February 19, 1913, commonly called the Elkins Act, are founded upon lawfully published and filed tariffs and **would seem not to apply in the absence of such lawfully published and filed tariffs.**

"It is thought, therefore, that telephone, telegraph and cable companies should be required to publish, file and post tariffs of schedules of their charges for interstate business. There are thousands of small independent telephone companies whose business is

intrastate, except in occasional instances where their lines are used in connection with the lines of other companies for interstate messages. The Bell Telephone System has, as we are informed, more than five million central and pay telephone stations. It would probably be unreasonable and unnecessary to require that full schedules of charges should be posted in every telephone booth or in every branch telegraph office. All rates for interstate business should, however, be filed with the Commission **and be so posted as to afford interested users or patrons opportunity to ascertain the lawful charge for a given service.**

"Section 6 of the act authorizes the Commission to modify the requirements of the section with respect to publishing, posting and filing of tariffs, and presumably that authority would extend to the tariffs of telephone and telegraph and cable companies, if there were a general requirement for them to publish, file and post same.

"We **recommend,** therefore, that Section 6 of the act **be amended** so as to **require** telephone, telegraph and cable companies to publish, file and post schedules of their interstate charges in such manner and to such extent as may be required by the Commission.

"In this connection attention is called to the apparent **necessity for changes in the Elkins Act** in order to make it clearly applicable to telephone, telegraph and cable companies."

It is to be particularly noted that the above remarks were contained **in an official report by the Interstate Commerce Commission to Congress;** that the Commission therein recommended to Congress the passage of amendatory legislation by which telegraph companies would be required to file their tariffs; and that **no such legislation has ever been enacted by Congress,** which saw fit to leave the law as noted in the Commission's report. It would hardly be a violent presumption to suppose that the telegraph companies themselves were not anxious to have the law amended. If they had desired such an amendment, it would doubtless have been had, as it is hardly likely that anyone else would have objected to telegraph companies being required to file tariffs.

Even in 1920, when the Interstate Commerce Act was extensively amended by the Transportation Act and some of the other provisions of the act were extended to telegraph, telephone and cable companies, **no requirement was made that such companies should file and post tariffs,** or that their rates should not be legally effective until posted and filed. Compare Act of February 28th, 1920 (41 Stat. at L. 456.)

In the *Unrepeated Message Case, 44 I. C. C. 674,* upon which the defendant relies, the Commission said:

> **"So far as the specific requirements of Section 6 are concerned, the rates, charges, rules and regulations of telephone and telegraph companies may be and customarily are, established and offered to the public without first being published and posted**

> **with the Commission, a procedure that must be observed by all other carriers under our jurisdiction before they may lawfully offer their services to the public or legally affect changes in their rates and practices."**

The correctness of the Commission's construction of the law is **admitted by the defendant Telegraph Company.** See page 30 of their brief in this Court, where they say:

> "* * * In the case of telegraph companies, Congress has concluded that it is permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations, as is also the same with respect to its regulations and classifications of messages and the rates therefor."

See also page 37 of the brief of the plaintiff in error, where counsel say:

> **"Knowing all these things, Congress evidently refrained from requiring telegraph companies to adopt the stringent rules which had been laid down respecting filing tariffs or regulations with the Interstate Commerce Commission, or making provision for filing them at offices of the telegraph companies."**

Telegraph Companies, Unlike Railroad Companies, Are Not Subject to Penalties for Departing from Tariffs, or for Discrimination.

Another important distinction between telegraph and telephone companies, on the one hand, and railroad com-

panies on the other, is that while railroad companies are subject to penalties for departing from published rates, telegraph companies are not.

Paragraph 6 of the Interstate Commerce Act prohibits carriers of passengers or property from departing from established rates. These provisions, as already shown, do not apply to telegraph or telephone companies. Further, no provision of the Interstate Commerce Act, as amended in 1910, provided any penalty for discrimination by telegraph companies. The section of the act establishing and defining the offense of unjust discrimination (Section 2) applies by its terms only to the transportation of passengers or property. Section 10, which establishes a penalty for unlawful discrimination, also in terms applies only to transportation of persons and property.

It was not until the passage of the recent Transportation Act of 1920, approved February 28th, 1920 (more than two and a half years after the transaction upon which this suit is based) that Sections 2 and 10 of the Interstate Commerce Act were amended by introducing the words "transmission of intelligence", so as to establish the offense of unlawful discrimination in the business of telegraph companies and so as to make them subject to the same penalties as theretofore provided for railroad companies. See Transportation Act of 1920, Sections 404, 414.

While Section 6 of the Interstate Commerce Act was further amended by Congress in 1912, by the Act of August

24th, 1912, Chapter 390, Section 11 (4 Federal Statutes Annotated, 426; U. S. Compiled Statutes 1916, Section 8567), Congress did not include in the amendment any provision requiring telegraph companies to file tariffs or prohibiting them from departing from tariffs once filed.

By the Transportation Act of 1920, approved February 28th, 1920, Sections 409, 410, 411, Congress again amended Section 6 of the Interstate Commerce Act, but again deliberately abstained from including in the amendment any provision requiring telegraph companies to file tariffs, or prohibiting any departure by them from tariffs once filed. This deliberate abstention on the part of Congress is the more significant because of the care which Congress took to amend Sections 2 and 10 of the Interstate Commerce Act, so as to make them applicable to telegraph companies. See Sections 404 and 414 of the Transportation Act of 1920 above referred to. In 1920 Congress thus deliberately emphasized its intention that telegraph companies should be for the first time made subject to certain provisions of the Interstate Commerce Act, to which they had not been subject prior to 1920, but that they should still not be included in the provisions requiring the filing of tariffs and prohibiting departures from tariffs, but should continue free to file tariffs or not as they saw fit, and to make such changes in their tariffs and rates as they might elect.

The defendant telegraph company cannot, therefore, possibly contend that the Act to Regulate Commerce, as it

existed at the time of the sending of the message involved in this case (or, indeed, even as it exists today) has, or was intended to have, anything like the comprehensive application to telegraph companies that it has to railroads and carriers of persons and property.

As pointed out by the Interstate Commerce Commission in its 1911 report to Congress, above quoted, the Elkins Act (32 Stat. L. 847), forbidding rebates, etc., does not apply to telegraph companies. Notwithstanding the recommendation of the Commission, Congress has not seen fit to amend the Act so as to make it apply to telegraph companies.

Where the Law Does Not Require the Filing or Posting of Tariffs, the Public Is Not Put on Notice by the Voluntary and Uncontrolled Election of One Telegraph Company to File Tariffs.

It is settled law that the recordation of an instrument not required to be recorded does not operate to give notice. See *35 Cyclopedia of Law and Procedure, 350:*

> "If the instrument affecting the title of the seller is duly filed and recorded, the record is constructive notice to the purchaser, provided it is filed in the proper office, and if recorded within the time prescribed by the statute, it is constructive notice even to purchasers between the date of execution and the date of registration. **If, however, such an instrument is not required to be recorded, the record thereof will not constitute constructive notice.**"

In *20 Ruling Case Law, page 355*, the rule is thus stated:

> "Aside from the record of instruments provided for by such Acts, it may be said that the mere filing or recording of an instrument in a public office does not constitute notice to the public. * * *"

Glenn v. Davis, 25 Maryland, 208:

> "Where a paper is not entitled by law to be recorded, placing it upon record does not operate as constructive notice."

Janelle v. Denoncour, 68 New Hampshire 1, 44 Atlantic 63:

> "The bill of sale not being an instrument required by law to be recorded, a record of it is not notice of sale to the creditors of a vendor."

Williams v. Logan, 32 Georgia 165:

> "The registration of such conveyances only as are required by law to be registered is constructive notice to subsequent purchasers."

Morel v. Houstoun, R. M. Charlt. (Georgia), 284:

> "A deed of personal property made in 1795 does not require to be recorded, and, if recorded, is not notice to subsequent purchasers. **Such persons may safely assume that there is nothing on the records** which could affect their rights."

See also

Mueller v. Engeln, 75 Ky. (12 Bush.) 441.
Braxton v. Bell, 92 Virginia 229, 23 S. E. 298.
Rauh v. Morris, 40 Okla. 288, 137 Pac. 1174.
Pitcher v. Barrows, 17 Pick. (Mass.) 36.

The rule thus laid down has had the specific approval of this Court. See *Burck v. Taylor, 152 U. S. 634,* holding:

> "That the filing of an instrument for record in a public office of the State, for the record of which the statutes of the State made no provision, carried with it no notice to other parties."

The rule thus supported by authority is also the only one consistent with reason and justice. If an instrument is not required to be recorded or filed, it is not necessary for third parties to examine the records. Such persons may safely assume that there is nothing in the records which could affect their rights.

If an instrument not required to be recorded is, in fact, voluntarily filed for record, the rights of third parties cannot be affected. To permit them to be affected would be to give the effect of law to the voluntary act of those seeking to accomplish some special purpose by recordation, by ascribing to the recordation all of the effect which would follow from the requirement of law. In such a situation no one could rely upon the provision of the law itself that the instrument need not be recorded.

Instruments of pledge are not required to be recorded. *(31 Cyclopedia of Law and Procedure, 699,* and cases cited.) Is a third person then bound nevertheless to examine the records? And if he fails to do so, will he be affected by any notice which an examination of the records would have disclosed? It seems to us that these questions answer themselves.

The situation is precisely the same in the present case, where no law required the filing of the defendant's tariffs. The defendant's voluntary and uncontrollable act in filing them cannot affect the plaintiffs here with notice. The rights of the plaintiffs cannot be determined by the voluntary acts of the defendant, not governed by the law and over which the plaintiffs had no power.

In *Boston and Maine Railroad v. Piper, 246 U. S. 439*, the Supreme Court decided that:

> "Illegal conditions and limitations in a carrier's bill of lading do not gain validity from the filing of a form containing them with the Interstate Commerce Commission."

By parity of reasoning, the voluntary, revocable act of the defendant Telegraph Company in filing its tariffs with the Interstate Commerce Commission do not give the provision of those tariffs the effect of law, nor make them binding upon the public as they would be if required by law to be filed and forbidden to be departed from.

The Contention that the Public is Controlled by the Voluntary Filing of Tariffs Would Expose Those Dealing With Telegraph Companies to the Caprice and Whim of the Directors of the Telegraph Companies.

If the directors of a telegraph company see fit to file tariffs with the Commission, then the argument is that the

public must be bound thereby. If the directors see fit not to file such tariffs, they need not do so, and the public is equally bound by their failure to do so.

If the directors of the telegraph company, after having once filed tariffs, see fit to depart from those tariffs and to entirely ignore the same, they may do so with impunity. There is no penalty provided.

It cannot be the law that the rights of the public are controlled by the caprice and arbitrary decision of the directors of telegraph companies.

It cannot be that the purely voluntary act of the directors of telegraph companies is entitled to the same force and effect as the positive and mandatory requirement of the law.

In this very case the statement of facts shows that the defendant telegraph company did not file its tariffs with the Interstate Commerce Commission until 1916 (Tr. p. 18), or six years after the amendment of 1910 to the Interstate Commerce Act. The defendant's directors saw fit not to file tariffs for six years. In 1916 they made up their minds to file tariffs. In 1921, they may make up their minds to withdraw them. At any time they are at liberty to ignore them or to depart therefrom and pay no attention thereto without incurring any of the specific penalties provided for railroad companies.

Can it be seriously argued upon this state of facts that the defendant telegraph company can be free to act en-

tirely as it chooses, to observe or to ignore tariffs which it is not required to file or to maintain; and that the public is entirely at the mercy of the telegraph company and must do as the directors of the telegraph company elect it should?

There is no evidence that other telegraph companies have elected to file their tariffs with the Interstate Commerce Commission. It is admitted that no telegraph company is required to do so. Very probably, the Postal Telegraph Company or other independent lines have filed no tariffs. So far as we are advised, certainly the telephone companies (which are in exactly the same legal situation as the telegraph companies) have filed no tariffs.

Is the Western Union Telegraph Company, then, to be in a class unto itself, distinct and apart from any other telephone or telegraph company?

Is the Western Union Telegraph Company to have a right to put itself in a class to itself according to the revocable whim and desire of its Board of Directors or its Executive Committee?

Is the Western Union Telegraph Company to be permitted to make its own law?

Unless the telegraph company can bind the public by its private regulation without publishing the regulation or calling it to the attention of its customers, how can the telegraph company attain a different result by filing the tariff voluntarily **(after six years of non-filing)** in a place where it is not required to file it?

The defendant here did not see fit to file its tariffs until May 2, 1916. Supposing that the plaintiffs, on May 1, 1910, had, as an extraordinary precaution, inquired at the Interstate Commerce Commission for the tariffs of the defendant company: the plaintiffs would have been advised that no tariffs had been filed. It could not then reasonably be claimed, we submit (notwithstanding the broad language of defendant's brief) that the plaintiffs, in sending a message on May 1, would be controlled by any private regulations of the defendant company, not communicated to them. Suppose, then, that on the next day the defendant company saw fit to file its tariff. How are the plaintiffs to know that the company has done so? Are they required to inquire daily of the Commission as to whether tariffs have been filed?

Suppose other telegraph companies have not filed their tariffs with the Commission. The parties dealing with them cannot be bound by private regulations not printed on the forms actually employed. Must persons dealing with such telegraph companies inquire daily of the Commission to ascertain if the telegraph companies have seen fit to change their practice and to file tariffs containing new regulations not on their forms and not called to the customer's attention?

These are but the more obvious of the logical and practical difficulties which the maintenance of the defendant's theory in this case necessarily involves.

In the *Hooker case*, not only were the tariffs required to be filed, but they were required to be posted in two public and **conspicuous** places and kept **open to public inspection at every depot or office.** See Section 6 of the Interstate Commerce Act, which provides that:

> "Such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

In the opinion in the *Hooker case*, the Court emphasized the fact that these provisions were complied with and that the tariffs were kept on file, open to inspection, in accessible form, at the station in Boston, and notice to that effect was posted in the baggage room **in a conspicuous place.** See *233 U. S., at 108*.

There is no showing in this case that the defendant telegraph company, after voluntarily electing to file its tariffs with the Interstate Commerce Commission ever voluntarily elected to comply with the other requirements applicable to carriers, or **ever printed or published its tariffs or kept them open to public inspection.** In the absence of such a showing, certainly none of the grounds which existed in the *Hooker case* for the imputation of notice to the shipper can be said to apply in this case.

The Ex-Parte and Uncommunicated Establishment by a Telegraph Company of a Regulation Limiting Its Liability Cannot Affect Persons Without Notice.

The defendant telegraph company apparently concedes that the voluntary filing of tariffs in Washington would not in itself affix the public with notice or subject the public to limitations of liability; for counsel take the position that, independent of any filing, the public is bound by limitations of liability established by the telegraph company in its regulations without regard to whether such regulations are filed or whether they are in any manner known. See pages 22, 23 and 30 of petitioner's brief. At page 30, counsel say (black letters ours):

> "**When the telegraph company, therefore, by its board of directors, duly enacted the regulations,** as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, **the rules binding the public were such rules thus enacted** until changed by such company or by order of the Commission; and **it made no difference whether they were known to the public or not;** each class of messages took the rate attaching to that class of messages and the measure of liability as fixed by the regulations for that class."

At pages 23 and 24 counsel say:

> "The principal object of filing the defendant's rates and schedules with the Interstate Commerce Commission was to make it easy for the public to ascertain or for the company to show what the legal

> rate and regulation was on the particular date and with respect to the particular class of service; it **was not because defendant was under any misconception as to the necessity of filing rates or regulations,** or as to the effect of such filing on the question of whether a rate or regulation was legal."

And, again, at page 30, counsel say:

> "But in the case of telegraph companies Congress has concluded that it is **permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations,** as is also the case with respect to its regulations and classifications of messages and the rates therefor."

Counsel thus contend that it was the intention of Congress that persons dealing with telegraph companies should be bound by conditions of which they have no actual knowledge or notice of any sort, which are not brought home to them in any way, and which the telegraph company may put into effect without either filing with the Commission or any publication at stations.

We submit that such a conclusion is so startlingly inconsistent with the most fundamental considerations of justice that the Court cannot lightly impute to Congress any intention to sanction such a result, much less to require it.

In *Cleveland, C. C. & St. L. Railway Co. v. Hirsch, 204 Federal, 849,* the Circuit Court of Appeals for the Sixth Circuit, said (at p. 853):

> "The object of **requiring** tariffs to be published is not only to impose upon the carrier the duty of

> equality in service and rates, but also to enable shippers to protect themselves in that behalf."

It is one thing to say, as was said in the *Hooker case*, that a shipper is put on notice of provisions in tariffs which could not be made effective without being filed, and which must be not only filed with the Commission, but printed and kept open to public inspection. It is quite another thing to say that customers are put on notice of private regulations made by telegraph companies, which they are not required to file or to publish, and which they are at liberty to change at any time as they see fit.

At page 22 of their brief, counsel say:

> "In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate or regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed before it is legal and effective. In the case of the other carriers subject to the same act, namely, telegraph and cable companies, the act does not require the filing of the rate or the regulation, and in the absence of this requirement the regulation is legal and binding **the moment it is fixed and established by the carrier.**"

And, at page 23, counsel say:

> "But **filing does not enter** into the determination of the question whether a telegraphic rate is or is

> not the legal rate; the test in the case of a telegram is, was the rate charged the one **initiated by the telegraph company** prior to the date of the message, and was it, therefore, the regularly established rate?"

But is it not unthinkable that Congress would leave it in the power of telegraph companies to control the rights of the public by private agreements, not communicated to customers, not filed and not published? Taking the last language quoted from counsel literally, it would mean that the defendant company might establish a private regulation limiting its liability, which would bind the public even though such regulation was not published or filed anywhere. The public would then be entirely at the mercy of the private rules of the telegraph company, which it would have absolutely no means of ascertaining.

This extraordinary contention would ignore entirely the emphasis placed in the *Hooker case* and all of the other decisions to which we have referred upon the **requirement** of the law that railroad companies should file tariffs, and upon the provisions of the law forbidding under heavy penalties departures from the rates so filed (none of which requirements or provisions are applicable to telegraph companies). Section 6 was the particular reliance of the Court in the *Hooker case* (see pages *114, 115, et seq., 233 U. S.)* The Court found that Section 6, which required the rates to be filed and forbade departure therefrom, made everything pertaining to the rates part thereof and made it unlawful to deviate from the rate as filed. The Court would

obviously not have reached the same result had there been either no requirement of law that the rate be filed with the Commission or no prohibition of any departure from rates so filed.

All of the other related decisions of this Court are built up upon and about the fundamental proposition that rates are required by law to be filed; that when filed they may not be departed from; and that, for that reason, rates, and all matters affecting rates, become, when published, in effect a part of the law. The filing and publishing of the rate in accordance with law is the **act which establishes** it in the case of railroad companies. *(United States v. Miller, 223 U. S. 602; Texas & Pacific Railway v. Cisco Oil Co., 204 U. S. 449.)* This, as the decisions show, is because the law **requires** the filing and publication of such rate by railroad companies and **forbids** any departure from such rates by railroad companies. **The law makes no such requirement and no such prohibition in the case of telegraph companies.**

The Western Union Telegraph Company's contention on this point reduces itself to the proposition that the *Hooker case* would have been decided just as it was decided even if the Interstate Commerce Act had contained no provisions requiring the filing and posting of tariffs by railroads. This contention appears in the language used by counsel in their brief at pages 29 and 30. Telegraph companies today are, counsel there argue, in the same position as railroad companies, except as to the requirement for the filing and post-

ing of tariffs, which requirement, counsel say, "has no significance or peculiar value with respect to the rates, except as they secure persons dealing with the carriers equal facilities for protection against unreasonable and discriminatory charges." The protection of the public against unreasonable and discriminatory charges appears to us to be rather fundamental. It is fairly accomplished only by making the filing of tariffs compulsory and providing penalties for departures therefrom. It is not fairly accomplished by leaving the public at the mercy of the telegraph companies, as defendant here would leave it.

Counsel's argument is that the *Hooker* decision rests upon the general obligation of carriers not to discriminate, and not at all upon any requirement for the filing and posting of tariffs. But the obligation of carriers not to discriminate exists at common law. (See *Western Union Telegraph Company v. Call Publishing Co., 181 U. S. 92.)* **And if the present contention be sound, then apart from any provisions of the Interstate Commerce Act, a shipper was bound at common law by a limitation of liability not disclosed to him if the carrier could show that it had disclosed such limitations of liability to others similarly situated.** This result could not be reached without reversing all of the earlier decisions of this Court rendered prior to the enactment of the Interstate Commerce Act, as well as all of the decisions of every other Court to which the question has ever been presented.

The Provisions of Section 1 of the Interstate Commerce Act as to Classification of Messages are Permissive Only.

Counsel for the telegraph company argue that the company should escape liability here because Section 1 of the Interstate Commerce Act, as amended in 1910, provides that telegraph companies may classify messages and may charge different rates for the different classes. But the Court will note that the language of the Act is purely permissive (and not mandatory as in the case of carriers), the pertinent language reading as follows (black letters ours):

> "Provided that messages by telegraph, telephone or cable subject to the provisions of this act, **may** be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates **may** be charged for the different classes of messages."

This amounts to nothing more than a permission to the defendant company to classify its messages by proper agreements. It does not **require** the telegraph companies so to classify them. If it did, the telegraph company might more logically claim that it was illegal for it not to classify them or to enter into any agreement from which non-classification would follow (although it would not even then follow that the innocent plaintiffs should be penalized by an illegal act of defendant—see *infra*). But there is, we repeat, no requirement, and all that the law does is to say

that the telegraph companies may, if they see fit classify their messages and charge different rates for the same. We do not deny that the Telegraph Company **might** have done this by appropriate contract or provision on the cable form in the present case; **but it did not do so.** Nothing in the section referred to relieves the telegraph company of the necessity of bringing its classifications home to the notice of its customers and procuring their assent thereto.

The utmost accomplished by the language in Section 1. relied upon by the telegraph company, is to preclude customers with whom agreements for classification **are actually in fact made** (by appropriate conditions and recitals in the telegraph form or contract for forwarding) from claiming that such agreements are invalid. In many states it is held that such agreements and classifications are in fact invalid and that telegraph companies are liable for unrepeated messages to the same extent as for repeated ones. The effect of the language quoted from the amendment of 1910 to Section 1 of the Interstate Commerce Act, is to shut off this argument so far as interstate messages are concerned where an agreement for such classification is actually made. This is the effect, and the only effect, of the recent decision of this Court in *Postal Telegraph Company v. Godwin, 251 U. S. 27.* In that case, there was an express provision in the contract between the telegraph company and its customer that the liability of the telegraph company was limited if the message was not repeated. By the doctrine of the Courts of Mississippi, where the contract was made, this limitation was invalid. This Court held

that as the message was an interstate one, it was governed by the Federal law, and that the limitation expressly agreed on would be maintained in view of the language of the Interstate Commerce Act and the decision in the *Primrose case (154 U. S. 1)* upholding the validity of such an express agreement **when actually made in fact.** Nothing in this decision affects the present case, where no limitation of liability was ever in fact provided for or agreed to. *Quoad* this case, the telegraph company did not see fit to avail itself of the **permission granted it to contract** for limited liability.

Even If It Were Shown that the Telegraph Company's Failure in This Case to Use Forms Providing for Limitation of Liability Amounted to Discrimination for Which the Telegraph Company Might Be Punished, that Would Not Justify the Penalization of the Innocent Plaintiff.

It is argued that a decision for the plaintiffs in this case will lead to a discrimination in favor of the plaintiffs and against those with whom the telegraph company has seen fit to make contracts for limited liability. As a matter of fact there is no evidence in this record to show that the telegraph company is in fact discriminating between the plaintiffs and other customers **similarly situated.** While the defendant company's domestic telegrams appear to be taken upon forms containing limitations of liability, there is no evidence that it observed such forms in the case of foreign messages received by it abroad for transmission.

It does not appear but that every foreign customer of the defendant company is in the same position as these plaintiffs. If such customers are in the same position, then there is not even an apparent discrimination. This Court could not undertake to say that the telegraph company could not handle foreign messages upon a basis different from that upon which it handles domestic messages. Even if it were true that the defendant company could not fairly establish a different basis, such basis, if in fact in existence, would be legal until properly changed upon proper complaint being made after proper proceedings to that end.

But even if it were conceded that the effect of the contract made by the defendant here, without any limitation of liability, was to discriminate in favor of foreign senders of cablegrams as against domestic senders of telegrams (disregarding differences in the character of the cases and the situation of the parties), it would still not follow that the plaintiffs should be deprived of their right to recover the damages which they have suffered through the defendant's fault.

Why should the innocent plaintiffs be penalized again for the fault of the defendant company? As we have pointed out, it is not shown that the plaintiffs here had their attention called to the fact that the telegraph company was assuming no responsibility for this message. **It is not shown that plaintiffs knew that the telegraph company was making contracts with other customers providing for classification of messages into repeated and unrepeated messages.**

The case is not, therefore, that which would be presented if the plaintiffs had, with knowledge, entered into a contract which they knew to be discriminatory in their favor.

Why, then, should the innocent plaintiffs be penalized, and why should a contract which they never made be imposed upon them, merely because the defendant company (which knew the facts, while the plaintiffs did not) saw fit to make a contract with plaintiffs different from that which it makes with other customers?

Suppose a telegraph company made a contract with A to carry a message for fifty cents. Suppose the same company, then, without A's knowledge, made a contract with B to carry the same message, between the same points, for one dollar. This would be a discrimination in favor of A and against B. But could it be said that the contract with A was null for that reason and that A was not entitled to recover upon his contract for any damages caused to him by its breach? The answer must be, we think, clearly, No. The remedy for the discrimination is not the annulment of the contract or the penalization of A, but the punishment of the telegraph company which has practiced the discrimination. Other senders of messages charged at different rates might recover the excess charges from the defendant *(Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92.)* Apart from such recovery, as we have shown *supra*, the law provided no specific penalties for discrimination by telegraph companies, and the defendants were not even subject to that risk.

But if they had been, the plaintiffs' right to recover for their damages would not be lost by the wrongful act of the defendants in discriminating through their failure to make a contract for limitation of liability—a failure to which the plaintiffs were not parties, and in which they did not connive, and for which they could in no manner be held responsible. Plaintiffs could not be affected by illegal conduct on the part of the defendants, in which they did not co-operate. See *13 Corpus Juris, 516, 517:*

> "An agreement is not necessarily illegal because carried out in an illegal way, if this was not contemplated when the agreement was made. Where the contract is illegal for other reasons than that it involves moral turpitude, ignorance of the illegality of the contract on the part of the party seeking relief has been considered as strong ground for granting relief to him."

Ibid., page 517:

> "Where an agreement is lawful on its face, or is capable of being executed in a lawful way, and the intention of one of the parties is that it be so executed, he is entitled to enforce it, notwithstanding the other party intended an illegal act, if the first party was unaware of the illegal intention."

This principle was applied by this Court in a case cited in the opinion of the Circuit Court of Appeals, *Merchants Cotton Press Co. v. N. A. Ins. Co., 151 U. S. 368.* In that case, which arose in November, 1887 (subsequent to the

passage of the Interstate Commerce Act, but prior to the amendments of 1889 to that Act, which introduced the requirements of Section 6 as to the filing and posting of tariffs), cotton was destroyed by fire while in the hands of a railroad company which sought to escape liability on the ground that a rebate had been given to the shippers which was illegal and forbidden under the Interstate Commerce Act. This Court quoted with approval the following language:

> "We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability where it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced, but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence."

This decision is directly opposed to the telegraph company's attention that the *Hooker case* would have been de-

cided as it was independent of the amendments to the Interstate Commerce Act requiring the filing of tariffs. See also

Gibbs & Sterrett Mfg. Co. v. Bucker, 111 U. S. 597.

Williston on Contracts, Sec. 1631, p. 2868.

We have already called attention to the fact that the Interstate Commerce Act, as amended in 1910, contained no provisions prohibiting telegraph companies from departing from established rates or subjecting them to the definition of unlawful discrimination contained in Section 2, or to the penalties provided in Section 10.

It is true that telegraph companies are subject to regulations by the Interstate Commerce Commission. The Commission may order a telegraph company to change its rates or its regulations.

The Commission may order the defendant telegraph company, in the future, not to handle in this country any messages received from foreign countries without an express limitation of liability. But such future action by the Commission cannot have a retroactive effect and cannot operate to change the facts as they existed at the time the message here involved was accepted by the defendant company. And even as to future cases, if the telegraph company disobeyed such an order of the Commission, and accepted messages from foreign countries without contracting for limitation of liability, the effect would be, not to

impose upon the sender a contract which was not made, but to subject the telegraph company to the penalties (provided only since 1920) for disobedience of the orders of the Commission. So long as telegraph companies are not required by law to file their tariffs, the provisions contained in their tariffs cannot be said to have the force of law or to control the rights of third persons. There are undoubtedly other telegraph and telephone companies which have not filed tariffs with the Commission. The rights of third parties dealing with such companies must be necessarily governed by the agreement made between them and the particular telegraph or telephone company concerned. If any such telegraph or telephone company accepts a message from a customer without a limitation of liability, that customer must have the right to recover the full damages sustained by him through any negligence. It would make no difference as to the right of this customer that the telegraph or telephone company concerned was, in other localities and with other persons, making contracts particularly providing for a limitation of liability. The Commission may order the telegraph or telephone company to discontinue such discrimination; but the rights of the first customer which had already accrued could not be affected by such order. The Western Union Telegraph Company cannot put itself in a different or better position than that occupied by other telephone or telegraph companies by its own voluntary act. It cannot control the rights of innocent third parties to whom it has given no notice, by its own *ex parte* act.

Defendant's Contention Would Not Make for Uniformity. That May Be Accomplished Only by Compelling Defendant to Communicate Its Limitations.

If a customer goes into the office of the Postal or X Company, which has not filed tariffs because not required by law to do so, and there makes a contract, such a contract as is agreed upon between himself and the company, and is not required to make inquiry of the Interstate Commerce Commission, he surely has a similar right with the Western Union Telegraph Company.

If the position of the defendant telegraph company in this case is maintained, it would mean that one dealing with the Western Union Telegraph Company is in a different position from one dealing with some other telephone or telegraph company.

The rights of the Western Union Telegraph Company would be determined by one rule (established by the voluntary and uncontrollable act of the Executive Committee of the Western Union Telegraph Company) while the rights of other telegraph companies and parties dealing with them, would be controlled by a different rule.

Would this promote the uniformity for which the defendant company in this case claims that it is contending? On the contrary, we respectfully submit to the Court that such a result would defy uniformity and set it at naught. It would give one telegraph company the right, at its own ca-

price, to make a rule for itself different from that governing the actions of other companies in the same business. That is unthinkable.

We submit that the true rule, and the rule which Congress intended to accomplish, is this:

Telegraph companies are not required to file tariffs. The rates established by telegraph companies do not require filing to be effective. They may be established by the voluntary act of the telegraph company, and are binding without more. For that very reason customers dealing with them are not put on notice of the provisions of tariffs.

The rights of such customers are, therefore, controlled by the agreements made by them with the telegraph company. The Interstate Commerce Commission may, upon complaint or upon its own motion, order telegraph companies to change their rates or their forms of contract. After such orders are made, disobedience thereof by the telegraph company will expose it to the penalties provided by Section 10 of the law, since the amendment of that section, made in 1920, so as to bring telegraph companies within it. But the rights of customers dealing with the company will continue to be governed by the agreements actually made. If such agreements are contrary to those which the Commission has ordered to be made, the telegraph company will be punished; but the innocent customer cannot be penalized. The punishment of the telegraph company will be an effective means of preventing discriminations; but certainly no order of the Commission

directing telegraph companies to change the forms of their agreement can affect the rights of customers which attached before such changes were made or before they were ordered.

The Decision in *Shawnee Milling Co. v. Postal Telegraph-Cable Co. (101 Kans. 307)* Rests Upon Kansas Statutes Requiring the Filing of Tariffs by Telegraph Companies.

At page 32 of the petitioning telegraph company's brief in this Court, reference is made to the decision of the Supreme Court of Kansas in *Shawnee Milling Company v. Postal Telegraph-Cable Co., 101 Kans. 307, 186 Pacific, 493,* which is claimed to support the petitioner's position. It was there held that a telegraph message received for transmission by a telegraph company from the sender over the telephone would be subject to the provisions for limitation of liability contained in the tariffs filed by the telegraph company (which provisions were, however, held invalid). But the case is radically distinguished from the present case by the circumstance (which counsel for petitioner note at page 33 of their brief) that the Kansas statute, unlike the Interstate Commerce Act, affirmatively requires the telegraph companies to file schedules of their rates and charges for service and regulations pertinent thereto and provides that such rates and service are invalid until they are so filed, and, when formally promulgated, may not be departed from with impunity. See *Kansas General Statutes, 1915, Sections 8358, 8398, 8400, 8416.*

Upon our reading of the case, we do not find that the Kansas statute had not been complied with (as our adversaries claim in their brief); but that, however, is immaterial so long as the statute existed and forbade departures therefrom.

State ex rel. Postal Telegraph Co., 96 Kans., 297, 150 Pacific, 544.

The decision is, therefore, no more applicable than the *Hooker case* itself. And it may be noted that although the case was, by the special provisions of the Kansas statute, **requiring** the filing and posting of tariffs and forbidding departures therefrom, substantially analogous to the *Hooker case*, the Supreme Court of Kansas declined to follow the *Hooker* decision.

The Defendant Company Filed No Tariffs and Established No Rates for Cables Received by It Abroad.

As a matter of fact, even if plaintiffs could be bound by defendant's voluntary election to file a tariff or to establish a private and uncommunicated rate or regulation, the facts proven would not sustain such a defense, for there is no showing that the defendant company had established a tariff or regulation as to cables received by it abroad.

The tariffs voluntarily filed by the defendant company contained no provisions applicable to cables received by it abroad. The forms referred to in those tariffs were applicable only to cables received by it in this country. As to cables received by it in other countries, it is not shown to

have established any tariffs or any regulations, and as to them, there would therefore be, in any event, no foundation for the contention that the company had established a rate which made a limitation of liability an integral part thereof.

The Message Was Received by Defendant at Havre. The American Law Could not Operate Extra-Territorially to Create a Limitation of Liability Not Expressly Contracted For.

We have heretofore discussed this case as if it had arisen in this country and without reference to the facts that the plaintiffs are citizens of Spain, that the cable was sent from Barcelona, and that it was accepted for transmission by the defendant company at Havre. These facts present the interesting further question as to how far the rights of the present plaintiffs could be in any event controlled by the doctrine for which the defendant company contends. In other words, even if it were conceded that senders of messages in this country were bound by regulations containing limitations of liability not disclosed to them, how far could such limitations of liability be imposed by American law upon persons sending messages from abroad, *e. g.*, from Havre.

This inquiry involves two questions: (1) How far has Congress undertaken to pass a law affecting messages sent in a foreign country and received by the defendant abroad? (2) Assuming that Congress has undertaken to impose a limitation of liability, not agreed to, upon foreigners mak-

ing contracts abroad, how far, upon proper principles of the conflict of laws, has Congress authority to do so?

This Court has apparently held in the recent case of *Galveston H. & S. A. Railway Co. v. Woodbury, — U. S. —, 41 Supreme Court Reporter, 111 (December 13, 1920)* that the doctrine of the *Hooker* decision applied to a case where a passenger in Texas checked baggage over a Texas railroad although the journey of the passenger had originally begun in Canada. In that case the plaintiff's journey over the defendant railroad's line began in Texas and the defendant railroad received the baggage in Texas. In this case the journey of the message over defendant's line began at Havre and the defendant received the cable at Havre. It is not unreasonable to hold that a railroad company in Texas, receiving in Texas baggage from a passenger checking such baggage there cannot have its liability affected by the accidental fact that weeks or months before the passenger and the baggage had originated in Canada. But in the present case, that is not the situation. The cable here was received by the defendant company at Havre, and not in this country. As already noted at an earlier point in this brief, the tariffs and the regulations of the defendant company covered only cables sent from this country, and did not apply at all to cables received by the defendant company abroad; as to them the defendant company had established no tariffs.

Assuming, however, that *Galveston H. & S. A. Railway Co. v. Woodbury* decides that the Interstate Commerce Act

is intended to apply to contracts made in another country, the question arises as to how far, upon proper principles of private international law, a statute of this country can be applied to a contract made abroad. The question of conflicts does not appear to have been discussed in the *Woodbury case*. It was referred to by this Court in *Knott v. Botany Mills, 189 U. S. 69*, which is cited in the *Woodbury case*. In the *Knott case* the Court held void and unenforceable provisions of a bill of lading executed abroad which would have limited the liability of the shipper contrary to the express provisions of the Harter Act. It will be noted that that case (like the case of *The Kensington, 183 U. S. 263*, cited at page 37 of the telegraph company's brief in this Court) held invalid a limitation of liability which had been expressly contracted for abroad. In the present case, the converse situation is presented: the defendant desires to manufacture a contract for limitation of liability where none existed. It is one thing to say that a contract, valid where made, may not be enforced in a forum by the statute of which the contract is expressly forbidden. It is quite a different thing to say that the forum can create a contract where none existed by the law of the country where the agreement was made. There is no doubt that, generally, the obligations of parties are governed by the law of the place where their contracts are made. See *Liverpool Steam Company v. Phoenix Insurance Company, 129 U. S. 397*, where this Court held that:

> "A contract of affreightment made in an American port by an American shipper with an English

> steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, is an American contract and governed by American law so far as regards the effect of the stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage."

If the contract in that case was not governed by the English law, then the contract in this case may not be governed by the American law.

Counsel for the defendant telegraph company argue that it would be against the public policy of this country to permit the plaintiffs to recover in this case, relying for this proposition upon the decision in the *Kensington case*. But, as we have pointed out, in that case this Court declined to enforce a limitation of liability which had been made in Belgium and was valid there, on the ground that it was against public policy to permit the carrier to limit its liability. *Knott v. Botany Mills* was to the same effect. As just noted, the present case presents the converse question: is it against public policy for the Courts of this country to refuse to enforce a contract which does **not** provide for limitation of liability?

It by no means follows that because it is against public policy to enforce a contract for limitation of liability, that it will be against public policy to enforce a contract which provides for no limitation of liability.

We know of no public policy of this country which would require the Courts of this country to refuse to give a citizen of Spain a recovery against a telegraph company upon a contract made abroad for actual losses sustained by the breach of the defendant company.

What is there in the public policy of the United States which will be offended by making this telegraph company pay for the loss which it has caused? What is there against public policy in the contract made in Barcelona for the transmission of the message in this case without any limitation of liability?

Our public policy ordinarily is **against** limitations of liability. See the *Knott* and *Kensington cases* and the general denunciation of such limitations (subject only to specific exceptions) in U. S. Comp. Statutes, Sec. 8604a.

Counsel argues that the offence against public policy would be committed by permitting a citizen of Spain to recover upon a contract made in Spain, or France, when no unlimited contract could, as it is claimed, have been made in this country with a citizen in this country.

But it does not follow because an unlimited agreement could not have been made in this country (even if that were true, which we assume for the purpose only of this argument), that therefore it would be against the public policy of the Courts of this country to enforce such an agreement if valid where made. In *International Harvester Co. v. McAdam, 142 Wisconsin 114, 124 Northwestern 1042,*

26 L. R. A., N. S., 774, the Supreme Court of Wisconsin said:

> "The last rule that need be stated is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state merely because it could not validly have been made there; nor is it one to which comity will not be extended merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In *Milliken v. Pratt, supra*, the Court remarked substantially, even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral (the term 'immoral' being used in the broadest sense) is not, necessarily, nor usually, deemed so invalid that the comity of the state, as administered by its Court, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards in the judgment of the Courts, something pernicious and injurious to the public welfare. In *Greenwood on Public Policy*, at page 46, cited by counsel, the following rule is deduced from the authority cited: 'When a contract is valid under the public policy of the state where made, **it will be enforced in another state,** although the same would, by the statute laws of the latter state, be void, unless its enforcement would exhibit to the citizens of the state an example pernicious and detestable.'"

If telegraph companies were in fact **required** by the law of this country (as they are not in fact required) to make

contracts with limited liability for unrepeated messages with all senders of such messages in this country, and were forbidden (as they are not in fact) to make contracts without limitation of liability with senders of messages in this country—it would not follow that the Courts of this country should refuse on the ground of public policy to enforce a contract without limitation of liability made with a foreign shipper in a foreign country.

The argument becomes *a fortiori* when the Court recalls that not even in this country is a telegraph company forbidden to make a contract with unlimited liability. While Section 1 of Act to Regulate Commerce provides that telegraph companies "may" charge different rates for the two classes, there is nothing in that act, or in the laws of this country, which says that telegraph companies "**must**" so classify their messages or their rates. Any telegraph company, the present defendant included, could, at the time that the message involved in this case was sent, have made a contract without limitation of liability with any customer in this country, and it would have been subject to no penalty for so doing. If the defendant company, or any other company, had made such an unlimited contract with one customer and declined to make it with another, the company would have been discriminating among customers. Such discrimination will, since the Transportation Act of 1920 (but only since then) expose the telegraph company to penalties under the Interstate Commerce Act, as amended in 1920; but such discrimination would not have exposed the telegraph company to such penalties at the

time this message was sent, nor would it even now relieve the telegraph company from responsibility upon its contract as made, particularly as against the innocent customer, not aware of the discrimination.

But whatever the rights of senders of messages in this country may be, we submit that it is clear that no reason of public policy would require or justify the Courts of this country to deny redress to the present plaintiffs upon a contract made in a foreign country and valid where made, and containing in itself nothing offensive to good morals. Nothing in public policy requires or justifies the Court to impose upon these plaintiffs a contract which they never made and to deny them recovery for admitted losses sustained through the fault of the defendant.

It is immaterial that the mistake in transmission occurred between New York and New Orleans. The undertaking of the defendant company when it received this message at Havre was an entire and indivisible undertaking—to transmit the message from Havre to New Orleans. The Court's attention is called to the fact that this is not a case where the defendant company received the message in this country. The company received the message in France. The engagement of the defendant, so far as the plaintiffs are concerned, was an entire and indivisible one, to carry the message from Havre to New Orleans. The engagement cannot be divided and broken up according to the physical territory over which the message was transmitted.

The tariffs filed voluntarily by the defendant [illegible]

At page 44 of their brief in this Court counsel undertake to quote provisions of an International Telegraph Convention to which they claim the French and Spanish telegraph administrations were parties. *But there is no proof of this in the record,* and we never even heard that such provisions were supposed to exist until the filing of the opposing brief in this Court. If counsel attached any importance to these provisions it was their duty to make proof of them upon the trial and to give us an opportunity to meet such proof. And there is not even a suggestion that the provisions of such a convention, if they exist, have the force of law or that they were known or called to the attention of the plaintiffs before. No reference was made to them on the printed form on which the message was sent, which form we undertook to file in the record and which we abstained from filing only because counsel for defendants below insisted it was unnecessary in view of the agreed statement of facts. The burden on all these matters was upon the defendant.

which they had no knowledge, either actual or constructive, and which was not set out even in the tariffs which were voluntarily filed? Yet defendant contends that its liability is limited to an undisclosed amount—an amount not disclosed even in the voluntarily filed tariffs.

We believe we have shown that upon the law this case is radically different from any of those relied upon by defendant. Upon the equities the case is equally to be distinguished.

In the *Primrose case*, the Supreme Court remarked in conclusion (154 U. S., page 33):

> "In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Mr. Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties when they made the contract, as a probable result of a breach of it."

The considerations which moved the Court in that case are not present here. The message here was in plain Eng-

lish and entirely intelligible. It carried upon its face the indication of its importance and a warning as to the serious consequences which would be caused by an error in its transmission. The figures were written out and not represented by symbols. The message on its face plainly directed the sale of cotton, and the damages which would flow from a mistake in its transmission must have been in the contemplation of the parties.

In the *Hooker case* the Court emphasized the fact that notices of limitation of liability to $100 were posted in **conspicuous** places in the baggage room *(233 U. S. at p. 108)*. In the present case not the slightest intimation of any limitation of liability or of any classification of messages into repeated and unrepeated was brought to the attention of plaintiffs, nor were any means of information brought to their attention.

TO SUM UP.

We respectfully submit to the Court that the plaintiffs are entitled to recover for the heavy loss which they have innocently sustained through the negligence of the defendant for each and all of the following reasons:

(1) The message was sent in plain English (not in cipher) from Barcelona. It was received by the defendant company at Havre.

(2) No agreement for limitation of liability was made in fact. The form upon which the message was sent contained no such provision.

(3) Plaintiffs' attention was not called to any classification of messages into repeated and unrepeated or any limitation of liability upon unrepeated messages or to the opportunity and importance of having the message repeated to protect themselves from loss.

(4) The plaintiffs cannot be affected by provisions of tariffs which the Executive Committee of the defendant company voluntarily undertook to file in 1916 (six years after the 1910 amendment to the Interstate Commerce Act) because:

(a) Such filing is not required by any law of this country.

(b) Where instruments are not required by law to be recorded, their voluntary recordation cannot put third persons on notice or affect the rights of such third persons.

(c) Telegraph companies, by the laws of this country, unlike railroad companies, are free to make such contracts as they see fit, without filing tariffs containing the provisions of such contracts.

(d) Unlike the rates of railroad companies, telegraph rates are not legally established by the filing of tariffs.

(e) Telegraph companies not being required to file tariffs, there is no prohibition against their departure from tariffs voluntarily filed.

(f) The tariffs filed by the defendant company provided for the use of forms applicable only to mes-

sages sent in this country, expressly setting out limitations of liability. These forms were not used in this case and were not applicable thereto.

(g) As to cables received abroad, no tariffs were filed and no forms prescribed for use.

(h) If persons dealing with the Western Union Telegraph Company are put on notice of tariffs filed in Washington, while persons dealing with other telegraph companies are not so put on notice, the Western Union Telegraph Company, by its own act, may put itself in a specially favored position, and uniformity of treatment is destroyed.

(5) No discrimination is shown between these foreign senders and other foreign senders, but if there were such discrimination in fact the plaintiffs were not parties thereto but were entirely ignorant thereof and their rights cannot be affected.

(6) The contract of the defendant was made abroad and valid when made. The plaintiffs, citizens of Spain, were not subject to the jurisdiction of this country. Congress has not undertaken to extend the Commerce Act to contracts made in foreign countries. If Congress had undertaken to do so, the law should still not be applied to such transaction because our law can have no extra-territorial effect. It is not against the policy of this country to permit a foreign citizen to recover from a negligent telegraph company losses actually sustained upon a contract containing no limitation of liability and valid where made.

The defendant company concedes in its argument that this Court cannot reverse the judgment in this case without maintaining the proposition that the public is bound by the *ex parte*, privately adopted and uncommunicated regulations of a telegraph company.

We earnestly submit that such a rule cannot receive the sanction of this Court and that the judgments of the lower Courts should be affirmed.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
Attorneys for respondent.

WESTERN UNION TELEGRAPH COMPANY *v.* ESTEVE BROTHERS & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 491. Argued April 12, 13, 1921.—Decided June 1, 1921.

A company engaged in transmitting telegraphic messages in this country and by cable between here and France, established a tariff offering a lower rate for unrepeated and a higher rate for repeated messages, and limiting its liability for mistakes in transmitting unrepeated messages to the tolls accruing to it therefrom, and filed the tariff with the Interstate Commerce Commission under the Interstate Commerce Act, as amended June 18, 1910, c. 309, § 7, 36 Stat. 539; an unrepeated message sent by plaintiffs from Spain passed over other lines to Havre, where it was received by the com-

pany and sent to New Orleans, an error being introduced on the land lines in this country which caused the plaintiffs heavy loss. The provision limiting liability was not expressed on the blank used in sending; nor did the senders know of its adoption and filing. *Held:*

1. Whatever the legal incidents of the transmission over the foreign lines, the company in carrying the message over its own lines from Havre was governed by the Interstate Commerce Act, as amended. P. 570.
2. The senders of the message were bound as a matter of law by the provision limiting liability, without regard to their knowledge or assent, because it was a part of a lawfully established rate which could not be departed from without creating an undue preference or advantage in violation of § 3 of the statute. P. 570. *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357.
3. *Quære*, Whether the rule that carriers of goods, in order to limit liability for negligence, must offer an alternative rate attended by full liability, (*Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317), applies to telegraph and cable companies? P. 574.
4. Where a cable company offered a lower rate, with limited liability, for unrepeated messages, and a higher rate for repeated messages, with a higher but still limited liability, *held*, that the senders of an unrepeated message who paid the lower rate could not escape its attendant limitation upon the ground that liability under the higher was also limited, since the latter limitation, if invalid, would not bind those who used the higher rate, and the question of its validity was not material in the case. P. 575.

268 Fed. Rep. 22, reversed.

CERTIORARI to review a judgment of the Circuit Court of Appeals affirming a judgment rendered against the present petitioner, by the District Court, in an action for damages resulting from a mistake in a telegram. The facts are stated in the opinion.

Mr. Rush Taggart and *Mr. John G. Milburn*, with whom *Mr. Francis Raymond Stark*, *Mr. Joseph L. Egan* and *Mr. W. B. Spencer* were on the brief, for petitioner.

Mr. Monte M. Lemann, with whom *Mr. J. Blanc Monroe* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In September, 1917, the Western Union Telegraph Company delivered to Esteve Brothers & Company at New Orleans, Louisiana, an unrepeated cable message from the latter's main office at Barcelona, Spain, directing a sale for future delivery of two thousand bales of cotton. The message actually sent had directed the sale of two hundred bales. The error in transmission resulted in a loss to Esteve Brothers & Company of $31,095. To recover compensation for this loss they sued the Western Union in a state court of Louisiana. The case was removed to the Federal District Court and there was tried by jury upon these additional stipulated facts:

The message was sent over lines of the Spanish Government Telegraph from Barcelona to Paris and thence over lines of the French Government to Havre. There it was delivered to the Western Union, transmitted by its cable to New York City and thence over its land lines to New Orleans. The error in transmission occurred on these land lines. The charge of $6.60, paid at Barcelona for transmitting the message, represented the sum of the local rates on the several connecting lines. The Western Union's share was $4.65; and of this $3.75 was apportioned to the cable system and 90 cents to the land lines. This Western Union rate was established by its tariff of telegraph and cable rates, in force since some time prior to June 18, 1910. Under the act of that date, c. 309, 36 Stat. 544, making telegraph and cable companies subject to the Act to Regulate Commerce, this tariff had been filed with the Interstate Commerce Commission in May, 1916, by its permission and pursuant to an appropriate resolution of the company. The tariff so filed embodied the long used classification of messages, rules and regulations, including the provision that the company "shall not

be liable for mistakes . . . in transmission . . . of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to it." The plaintiffs did not in fact assent to this limitation of liability. They did not, in sending the message at Barcelona, use a blank containing the provisions so limiting liability. They did not have actual knowledge of the resolution of the company or of the filing of the tariffs with the Interstate Commerce Commission.

The plaintiffs contended at the trial that in view of the above facts they were entitled to a verdict for the full amount of their loss. The company contended that, since the message had not been repeated, the verdict should be limited to $4.65, the amount received by it as tolls. A verdict was directed for $31,095 with interest; judgment thereon was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, 268 Fed. Rep. 22; and a petition for writ of certiorari was granted. 254 U. S. 624. The sole question presented for our decision is the amount of damages recoverable.

For more than fifty years prior to the transaction here in suit the Western Union had maintained these two classes of rates for general cable and telegraph service. The usual or basic rate was for service practically at the sender's risk, liability being limited to the amount of the toll collected. Another special rate entitled the sender to have the message repeated back to the point of origin and rendered the company liable in case of mistake or nondelivery up to fifty times the amount of the extra charge. The extra charge for this additional service was for telegrams one-half and for cables one-quarter of the basic rate. In *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, decided in 1894, this classification of rates and the limitations upon the company's liability were declared by this court to be reasonable and valid, in the absence of willful misconduct or gross negligence. The

limitation upon the company's common-law liability was held to be in the nature of contract; and this liability unlike that of a common carrier, was not an insurer's. It was merely for the damage flowing from failure to use due care in transmission. *Primrose* v. *Western Union Telegraph Co.*, *supra*, 14. Since the limitation of liability was in the nature of contract, the provision had to be brought home to the sender of a message in order to be legally binding upon him. Assent by the sender was ordinarily established if the message was written upon one of the company's blanks which set forth the limitation of liability. *Primrose* v. *Western Union Telegraph Co.*, *supra*, 25; compare *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 431. Whether, in view of long established practice, the mere sending of a message, although not written on such a blank, imported assent to the usual terms of the rate involved then an issue of fact. See *New Jersey Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 383. The question presented for our decision is whether since the amendment of June 18, 1910, to the Act to Regulate Commerce, the sender is, without assent in fact, bound as matter of law by the provision limiting liability, because it is a part of the lawfully established rate.

The Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544, broadened the scope of the Act to Regulate Commerce to include "telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from [a] State . . . to any foreign country." And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union in sending the message over its own lines from Havre to New Orleans was governed by the provisions of that act. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357. In the third paragraph of § 1 of the amended act Congress provided that messages might be "classified

into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates [might] be charged for the different classes of messages." Acting, in May, 1916, under the authority of that provision, the Western Union by appropriate action approved the tariff involved in the present case and by permission of the Interstate Commerce Commission filed with it the tariff, including the provisions here in question. The company was not required so to do by the terms of the act or by any order of the Commission; compare 25th Annual Report I. C. C. (1911) pp. 5, 6. But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27, 30; *Clay County Produce Co.* v. *Western Union Telegraph Co.*, 44 I. C. C. 670, 674.

The lawful rate having been established, the company was by the provisions of § 3 of the Act to Regulate Commerce prohibited from granting to anyone an undue preference or advantage over the public generally. For, as stated in *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, *supra*, 30, the "Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates." If the general public upon paying the rate for an unrepeated message accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage extend different treatment to the plaintiffs here. The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.

The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their

patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, and *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357. In the former case it was said, "If the charges filed were unreasonable, the only attack that could be made upon such regulation [limiting liability] would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce." So here the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission.

It is strongly argued that the rule is not applicable to the situation before us, because of the difference in the provisions of law which govern the establishment of railroad and of telegraph rates. The railroad rate is established, and can only be established by filing the tariff with

the Commission. Telegraph companies may initiate rates without filing tariffs with the Commission, (*Clay County Produce Co.* v. *Western Union Telegraph Co., supra*). Plaintiffs insist that it is the filing and subsequent publication of the railroad rate which gives it the force of law and requires the shipper to take notice of it. But the contention, by dwelling unduly upon the procedural features of the act, would defeat the end which Congress had in view. Both railroad and telegraph-cable rates are initiated by the carrier. It is true that a railroad rate does not have the force of law unless it is filed with the Commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger. The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in § 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. Congress apparently concluded, in the light of discrimination theretofore practiced by railroads among shippers and localities, that in transportation by rail equality could be secured only by provisions involving the utmost definiteness and constant official supervision. Accordingly by § 6 it forbade a carrier of goods from engaging in transportation unless its rates had been filed with the Commission; and it prohibited, under heavy penalties, departure in any way from the terms of those rates when filed. In the case of telegraph and cable companies Congress appears to have considered that such stringent provisions were not required to secure the end in view. It did not make filing with the Commission a condition precedent to the existence of a lawful telegraph and cable rate. When, therefore, the Western Union initiated and established this

reasonable rate, the principle of equality and uniformity laid down in § 3 required that it should have exactly the same force and effect as the rate initiated by a rail carrier and filed according to the provisions of § 6.

It was suggested that the attempted limitation of liability must fail under the rule recently applied in *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317; because both the alternative rates offered in the Western Union tariff for cable messages were for limited liability, and because, therefore, no offer was made to the sender of a rate under which the company would assume full liability for all losses suffered through its negligence. It is by no means clear that the rule of the *Burke Case*—established for common carriers of goods—should be applied to telegraph and cable companies. See the *Primrose Case*, *supra*, p. 14. In any event, it is not applicable here. The Western Union did not, as in the case of telegrams, offer to send cable messages upon a special valuation to be made by the sender and paid for by an extra charge "based on such value equal to one-tenth of one per cent. thereof." But it offered alternative rates for repeated and for unrepeated cable messages. This long-established classification was expressly recognized as just and reasonable for cable as well as for telegraph messages in the amendment made by the Act of June 18, 1910, to § 1 of the Act to Regulate Commerce. The provision in the terms offered by the company is:

"To guard against mistakes or delays the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-quarter of the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face this is an unrepeated cable message and paid for as such.

". . . this company shall not be liable for mistakes or delays in transmission or delivery . . . of any un-

repeated message, beyond the amount of that portion of the tolls which shall accrue to this company; . . . [nor] of any repeated message, beyond fifty times the extra sum received by this company from the sender for repeating such message over its own lines. . . ."

The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.